FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DECISIONS

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COMMISSION DECISIONS

ERALS EXPLORATION COMPANY :
:
v. : Docket No. WEST 81-189-RM
:
RETARY OF LABOR, :
INE SAFETY AND HEALTH :
DMINISTRATION (MSHA) :

ORE: Backley, Lastowka and Nelson, Commissioners

DECISION

THE COMMISSION:

This case arises under the Federal Mine Safety and Health Act of 7, 30 U.S.C. § 801 et seq. (1982), and involves two related proceedings. first is a consolidated contest by Minerals Exploration Company Inerals") of an imminent danger withdrawal order issued pursuant to U.S.C. § 817(a) and a civil penalty proceeding dealing with an alleged lation by Minerals of 30 C.F.R. § 55.3-5 (1984). That matter was sided over by Commission Administrative Law Judge John A. Carlson. second proceeding, heard on an interlocutory basis by former Commis- n Administrative Law Judge Jon D. Boltz, involves Minerals' motion sanctions against officials of the Department of Labor's Mine Safety Health Administration ("MSHA") and the Secretary of Labor's trial nsel for alleged improprieties in prosecuting the proceeding before ge Carlson. In an unpublished order issued on April 7, 1982, prior Judge Carlson's decision on the merits, Judge Boltz denied Minerals' lon for sanctions. Approximately one year later, Judge Carlson ued his decision upholding both the imminent danger withdrawal order the citation and the judge assessed a civil penalty. 5 FMSHRC 669 ril 1983)(ALJ). Following Judge Carlson's decision, Minerals filed n the Commission a petition for discretionary review primarily llenging Judge Boltz's order denying sanctions. 1/

1/ The Commission is an independent adjudicatory agency established to olve legal disputes arising under the Mine Act. 30 U.S.C. § 823. Commission is not a part of and is in no way connected with the artment of Labor or the Mine Safety and Health Administration.

The crucial issues before us concern allegations of impropriety on the part of MSHA officials and counsel for the Secretary. For the reasons set forth below, we affirm Judge Boltz's order denying sanctions and we affirm Judge Carlson's decision on the merits. At the same time, we express our strong disapproval and, as appropriate, serve warning with respect to some of the activities of certain MSHA officials and the Secretary's trial counsel.

I.

Facts and Procedural History

At the time of the operative events in this case, Minerals operated the Sweetwater uranium project, a large surface uranium mine located near Rawlins, Wyoming. The underlying case arose in connection with a citation and imminent danger withdrawal order issued in February 1981 by MSHA to Minerals for allegedly violating section 55.3-5 by permitting loose, overhanging rock on the east wall of the C-1 pit. 2/ A hearing on the merits of the citation and withdrawal order was held before Judge Carlson in April 1981, and was continued until June 29, 1981.

Prior to resumption of the hearing, a telephone conference call was held on June 22, 1981, among Judge Carlson, Anthony Weber, counsel for Minerals, Phyllis Caldwell, counsel for the Secretary, and Bevelyn Suter, President of the Progressive Mineworkers Union ("the Union"), representative of miners at the Sweetwater mine. The conference call was initiated by Judge Carlson for the purpose of discussing the Union's written request that Union Secretary Daphne Hamilton be permitted to appear at the hearing to "help make sure that the facts are correctly represented." During the call, Ms. Suter expressed concern that falsified documents would be introduced by Minerals at the hearing. Attorney Weber subsequently testified that due to a bad connection he could not hear Suter's end of the conference call. Weber did understand, however,

2/ Former section 55.3-5 provided:

> Mandatory. Men shall not work near or under dangerous banks. Overhanging banks shall be taken down immediately and other unsafe ground conditions shall be corrected promptly, or the areas shall be barricaded and posted.

30 C.F.R. § 55.3-5 (1984). In January 1985, this provision was replaced by 30 C.F.R. § 56.3005 (1985), which is virtually identical.

Union was concerned over possibly falsified documents being used by Minerals at the hearing. 3/

Later that same day, following the conference call, attorney Caldwell received a telephone call from the MSHA sub-district office covering the Sweetwater mine, informing her that a letter had been received from Union Secretary Hamilton making similar allegations that falsified documents would be introduced at the hearing. As a result of that phone call, Caldwell and her supervisor, Senior Attorney James Barkley, arranged for an MSHA investigation into the claims of document falsification. MSHA Special Investigator Jerry Thompson was assigned to the task. Inspector Thompson began talking privately with Minerals drafting department employees and, by the next day, June 23, 1981, learned that Brian Baird was the Minerals draftsman who had worked on original drawings of the C-1 pit -- drawings that had become the focus of the inspector's investigation. Caldwell directed Inspector Thompson to interview Baird.

The inspector visited Baird's home in the Rawlins area on Sunday, June 28, 1981, the day before the resumption of the hearing before Judge Carlson. Thompson identified himself as an MSHA special investigator and stated that he wanted to ask Baird questions about the documents to be used at the hearing the next day in the Denver. Baird indicated that the drawings of the C-1 pit originally had been completed from survey notes but later had been changed, supposedly upon the basis of visual observations. Baird showed Thompson one of the original drawings and told him that there were other original drawings at the mine. Baird expressed concern that the modified drawings were not accurate. Before Thompson left Baird's home, he obtained a written statement from Baird regarding the changes in the drawings.

3/ During the call, Weber made comments which led other participants in the conversation to believe that he was threatening with discharge Union representatives Suter and Hamilton (who were then on sick-leave status with Minerals) if they participated in the hearing. Weber's comments became the focus of several additional proceedings. Prior to the resumption of the hearing on June 29, 1981, the Secretary filed with Judge Carlson a letter seeking the institution of disciplinary proceedings against Weber. Judge Carlson referred this letter to the Commission and the Commission referred the matter to Commission Administrative Law Judge Paul Merlin for disciplinary proceedings. The matter was resolved, based on stipulations, at a hearing before Judge Merlin. The judge admonished Weber concerning his remarks but held that no further disciplinary proceedings were warranted. Disciplinary Proceeding (Minerals Exploration Co.), 3 FMSHRC 1919, 1920-21 (August 1981)(ALJ). The Secretary also initiated a discrimination case against Minerals based on this incident. FMSHRC Docket No. WEST 82-38-DM. That case eventually was settled by the parties.

Minerals' counsel, Weber (n. 3 supra). On the afternoon of June 29, Minerals began its defense by presenting the testimony of Project Manager Larry Dykers. Mr. Dykers testified about the plan map covering the C-1 pit. After Weber moved for introduction of the drawing, counsel for the Secretary, Barkley, requested voir dire. Barkley established that the map originally had been drawn by Baird and, as presented at the hearing, showed the existence of a safety bench on the east wall of the C-1 pit. Barkley then objected to the admission of the map as "irrelevant because it would seem to be a document that may have been falsified to the point that it is irrelevant." M. Tr. 472. 4/ Barkley indicated that he was prepared to subpoena Minerals' entire drafting department to testify concerning the alleged falsification.

Weber reacted with surprise but expressed a willingness to bring the Minerals employees to the hearing in order to resolve the matter. It was then 5:00 p.m. and the judge suggested an adjournment -- but only until the afternoon of the following day. Weber did not request a longer continuance or object to this procedure. This procedural decision set into motion the main series of events which led to the present litigation.

Barkley requested subpoenas for Minerals' employees and documents. The judge issued signed subpoenas in blank to Barkley. The evidence indicates that the parties never reached any understanding as to the individuals who would be subpoenaed. Barkley conferred with Inspector Thompson concerning the Minerals employees to be subpoenaed. They agreed that Thompson and another MSHA Inspector, Merrill Wolford (who had issued the underlying citation and imminent danger order), were to drive 250 miles to Rawlins to serve the subpoenaed individuals. Thompson telephoned Baird from Denver to inform him that he would be subpoenaed that evening to appear at the hearing in Denver the following day. Thompson asked Baird to inform the other draftsmen that they would be subpoenaed. Thompson inquired as to whether Baird had brought home his original drawings of the C-1 pit. Baird replied that he had not. Thompson told Baird not to worry because he would be bringing a subpoena requiring Baird to obtain the original documents.

At approximately 1:30 a.m. on June 30, 1981, the two inspectors arrived in the Rawlins area and began serving the subpoenas. Apart from Baird, they served four Minerals employees, all of whom refused an offer of transportation to Denver. The inspectors reached Baird's home at 3:00 a.m., and then proceeded to the mine offices, some 40 minutes away, to obtain original drawings of the C-1 pit. Baird questioned the propriety of taking the documents from the mine, and Thompson replied that the subpoena required that action.

4/ For purposes of this decision, transcript citations to the hearing

possibly relevant to the C-1 pit. They then flew to Denver in two company chartered planes.

Barkley met with Baird on the morning of June 30, 1981, upon the latter's arrival in Denver. Baird again expressed concern about his removal of the documents from the mine and Barkley told him "not to worry about it." S. Tr. 842. Later that morning, Barkley arrived at the Commission's Denver office, where the hearing was being held. He instructed Inspector Thompson to locate two of the subpoenaed witnesses, who worked in the drafting department, so that he could talk with them. Those two individuals told Barkley that the modifications in the drawings were based upon good faith subjective judgment. Barkley stated that "people had gone to jail trying to take refuge in subjective judgment." Dickey Affidavit at 4; Hill Affidavit at 6-7.

When the reconvened hearing commenced, Barkley announced that he would present all his evidence through Baird, and excused the other four subpoenaed employees. During the course of Baird's testimony, Barkley used the drawings that Baird had obtained from Minerals' office. These documents were entered into evidence without objection from Weber. At the conclusion of Baird's testimony, Weber requested and Judge Carlson permitted a continuance to allow Weber to respond on the matter of possible document falsification. After the close of the hearing, and upon request from Barkley, the judge ordered that the documents which had been produced in response to the subpoenas be kept in the hearing room overnight. The parties agreed that the next morning Minerals' employees would separate the documents into relevant and irrelevant categories. The Secretary's counsel was to arrive later in the morning for document inspection.

The following morning, Weber departed from the Denver area and left Minerals' Project Manager Dykers, who is not a lawyer, in charge of the document separation and production process. Dykers decided that the daily reminder diaries that some of the employees had brought did not have to be produced. Those employees returning to the mine that morning took their diaries with them. Barkley and other representatives of the government arrived later in the morning and proceeded to review the documents, including those separated out by Minerals as irrelevant.

During the examination of the documents, it was realized that the daily diaries were not present. Dykers indicated that they had been determined to be irrelevant and had been given to the employees returning to Rawlins. At Barkley's insistence, Dykers agreed to try to retrieve the diaries from the Minerals employees at the Denver airport. Dykers succeeded, and when the diaries were returned to the Commission offices, Barkley took them into a separate room for examination. Barkley subsequen refused to return the diaries to Minerals for a period of months, despite repeated requests from Minerals.

of the possibility that Judge Carlson might be called as a witness. The hearing on the sanctions motion covered four days (November 9-12, 1981), and Judge Boltz issued his order denying sanctions on April 7, 1982. 5/

In his decision denying Minerals' motion for sanctions, Judge Boltz found that Inspector Thompson had not coerced Baird's written statement and that Inspectors Thompson and Wolford had not acted improperly by serving the subpoenas and by entering the mine property with Baird in order to obtain the subpoenaed documents. The judge also determined that there was no impropriety on the part of counsel for the Secretary in conducting an independent investigation of the falsification allegations without notifying Minerals' counsel, in examining the subpoenaed documents that Minerals had designated as irrelevant, and in retaining and refusing to return the daily reminder diaries of Minerals' employees. The judge concluded that he found "nothing in the conduct of counsel for the Secretary or in the conduct of Inspectors Thompson and Wolford that was improper in the circumstances of this case." Slip op. 8.

Subsequently, on September 15, 1982, following negotiations between the parties, a joint motion for decision on the merits based on the existing record was filed with Judge Carlson. The judge issued his decision on the merits on April 6, 1983. In finding a violation, Judge Carlson did not utilize the record from the hearing before Judge Boltz on sanctions. Judge Carlson indicated that he was "not prepared to hold whether or not the drawings were 'falsified'," because "such a holding [was] not necessary to reach a proper decision on the merits of the case." 5 FMSHRC at 676. The judge stated:

> I did find Baird an earnest and believable witness with no discernible motive for dissembling. At the very best, the process by which the final set of drawings came about betrays a subjectivity, a flexibility, which robs them of any weight favorable to Minerals. Beyond that, even if the modified drawings were accepted as accurate, they would not persuade me of the absence of violation.

Id. Finding that other evidence independently supported a finding of violation, the judge concluded that Minerals had violated section 55.3-5 and that the imminent danger order had been issued appropriately.

5/ Minerals petitioned the Commission for discretionary review of Judge Boltz's order denying its motion for sanctions. The Commission, treating Minerals' petition as one for interlocutory review, denied the request without prejudice to renew after final disposition of the case by Judge Carlson.

Disposition of Minerals' Assertions of Improprieties

On review, Minerals repeats the assertions of governmental impropri raised before Judge Boltz. Minerals argues that it was prejudiced by the actions of MSHA officials and counsel for the Secretary and requests vacation of the civil penalty and dismissal of the proceeding. Minerals contends that these sanctions are necessary to deter the government from future impropriety and illegality, and to prevent the tainting of Commis proceedings. We examine separately each assertion of impropriety.

A. Minerals' objections concerning the Secretary's initial investigation into the possible falsification of evidence

1. The general propriety of the Secretary's investigation

Minerals contends that it was improper for the Secretary to authori and direct between June 22 and 28, 1981, a "secret" investigation involv interviews with employees of the opposing party without advising the judge and opposing counsel. Minerals argues that such actions violated Commission discovery procedure and opened the door to unethical conduct.

As Judge Boltz noted, the time period for completion of discovery under Commission Procedural Rule 55, 29 C.F.R. § 2700.55, had expired on June 22, 1981. However, when charges surfaced during the June 22 conference call that falsified evidence might be introduced, it was wholly appropriate for both parties' attorneys -- as responsible advocates and as officers of the court -- to pursue the matter. We hold that at that juncture of the case, in light of the nature of the allegations, either party could have proceeded properly by requesting the reopening of discovery (see 29 C.F.R. §§ 2700.55(a) & (b)), or by investigating the allegations. Within the adversarial framework of Commission trial proceedings, there is no general bar against investigations by either party into possible new evidence whose existence is suggested during the course of a trial.

We reject the contention that Minerals' counsel, Weber, was not on notice as to the existence of the falsification problem and the likeliho that the opposing party would have a vital interest in determining the truth of the allegation. As noted above, Weber was made aware from the comments of Judge Carlson during the conference call that the Union was raising an issue concerning his client's possible falsification of evidence. Weber should have been alert to the obvious implications of such a charge.

Thus, we discern no impropriety in the fact that the Secretary decided to investigate further the Union's allegations of falsified evidence. We note, however, certain ethical constraints relevant to

DR 7-104(A)(1)(1980 ed.). Cf. ABA, Model Rules of Professional Conduct, Rule 4.2 (1983). These model rules prohibit communications with an opposing "party" without the other lawyer's consent. We do not find it necessary in the present context to adopt formally these particular model rules or to construe the full scope of the term "party." Here, the Minerals employees contacted during the Secretary's private investigation appear to have been non-managerial draftsmen lacking substantial organizational responsibility. Moreover, we are mindful of the important purpose of these contacts and of the unusual circumstances of this case. For present purposes, we remind the Commission Bar of the need to be respectful of the ethical provisions cited above and of the developing law in this area. Cf. Massa v. Eaton Corp., 39 FEP 1211 (D. Mich. 1985). On the basis of the foregoing, we agree with Judge Boltz that there was no general impropriety in the Secretary's undertaking his investigation into allegations of evidentiary falsification.

2. Whether Inspector Thompson coerced Baird's written statement

Minerals contends that Inspector Thompson coerced Baird's written statement during their meeting at Baird's home. The evidence shows that Inspector Thompson identified himself to Baird as an MSHA special investigator and indicated that he wanted to discuss the drawings which were to be presented at the hearing in Denver. Inspector Thompson also told Baird that a refusal to talk with him could be construed as assisting in an attempt to cover up the falsification.

Judge Boltz found that Baird's statement was not coerced. The interview with the MSHA investigator occurred in Baird's home and was conducted in the presence of his wife. It lasted 45 minutes and unfolded in a conversational atmosphere. Baird himself displayed a generally cooperative attitude, although he experienced some understandable discomfo in supplying information that he believed might reflect badly on his employer. He volunteered a drawing from his portfolio and made free-hand sketches to help the inspector understand the modifications made to the drawings. On the other hand, Thompson's statement that a refusal to talk with him could imply guilt was overbearing and a reflection of poor judgment. We disavow such investigative tactics, but we conclude that this errant statement did not coerce a statement from Baird. Accordingly, in consideration of the totality of the circumstances, we find that substantial evidence supports Judge Boltz's conclusion that Baird's statement was not coerced.

hearing was improper. Minerals argues that Barkley introduced Baird's statement in a theatrical effort to disrupt its case by interrupting the hearing and catching Minerals by surprise. The surprise in question was not the type removed by the procedural rules or cases cited by Minerals. The surprise was collateral--that is, it was intended as an attack on the credibility of evidence. There was no change in the theory of the case upon which either side was proceeding. Moreover, given the fact that Weber was aware of the falsification allegations as of June 22, 1981, it strains credulity to believe that Barkley's production of Baird's statement could have come as a complete surprise to Minerals.

B. Mineral's objections to the subpoena process

Minerals' next major claims of impropriety focus on the subpoena process, which began at the recess of the hearing on June 29, 1981, following the introduction of Baird's statement. It is obvious that this juncture of the hearing was an unfortunate turning point, and most of the additional allegations of misconduct can be traced to the failure of the parties and the judge to evaluate adequately a practical and just method for proceeding with the case and resolving the complication that had arisen. The judge's late afternoon decision to allow a continuance of only one-half day when the witnesses and documents to be subpoeanaed were 250 miles away in Rawlins, Wyoming, was ill-conceived. Sound judicial practice requires that sufficient time be provided for the issuance, service of, and compliance with subpoenas. Such practice will avoid serving subpoenas in the middle of the night that require witnesses to travel with subpoenaed documents 250 miles to a hearing the next afternoon. However, we must observe that Weber's lack of protest and his acquiescence in this procedure seriously undercut Minerals' present objections.

1. Subpoenas in blank

Minerals challenges the judge's issuance of subpoenas in blank to Barkley. The issuance of subpoenas in blank is authorized by Fed. R. Civ. P. 45(a), which applies "so far as practicable" to Commission proceedings. 29 C.F.R. § 2700.1(b). Therefore, we perceive no error in the judge's issuance of blank subpoenas although such practice must be governed by careful discretion.

2. Scope of the subpoenas

Minerals next objects to the scope of the subpoenas duces tecum, in that they covered documents relevant to the entire C-1 pit from December 11, 1980, rather than being limited to the section of the east wall of the C-1 pit at issue from the later date of citation in February 1981.

or burdensomeness. 29 C.F.R. § 2700.58(c). However, trial counsel for Minerals failed to object to the scope of the subpoenas. Accordingly, we find no error.

3. Service of the subpoenas

Minerals also objects to the service of the subpoenas in the middle of the night and by an interested party. As a general legal proposition, there is no prohibition against either of these occurrences, although obviously better and preferable practice calls for service during normal hours. This is particularly so in a situation like the present, in which a reasonable continuance could have been granted without prejudice to either party. The subpoenas then could have been served during normal hours and the subpoenaed individuals would have had sufficient time to travel the 250 miles to the hearing in Denver. As a matter of policy, we do not encourage or favor service of Commission subpoenas in the middle of the night absent genuine emergency or extraordinary circumstances, which were not present here.

However, the clear inconvenience attendant upon the service conducted in this case does not render the service improper or illegal. Again, it must be emphasized that Weber, counsel for Minerals, failed to object and failed to urge an alternate timetable. We are also influenced by the fact that all but one of the subpoenaed Minerals employees was notified by telephone in the early evening of June 29, 1981, that they were to be subpoenaed to appear at the hearing in Denver the following day.

Notwithstanding the above, we are compelled to observe and disapprove the heavy-handed manner in which Thompson proceeded. The record indicates that he represented himself in a manner causing several of the subpoenaed witness to believe that they were being confronted by an agent of the Federal Bureau of Investigation. S. Tr. 278, 280, 312, 410, 443, 444. Moreover, several of these witnesses testified that Thompson's early morning intrusion caused genuine fear and intimidation. S. Tr. 253, 254, 346, 347, 413.

As to Minerals' objection to service by an interested party, Commission Procedural Rule 58(a) governing subpoena service states that a subpoena "may be served by any person who is not less than 18 years of age." 29 C.F.R. § 2700.58(a). Inasmuch as Rule 58(a) does not prohibit service by an interested party (assuming Inspector Thompson to be such a party), we find no irregularity in service of the subpoenas by Inspector Thompson.

Minerals challenges Judge Boltz's finding that there was no impropriety in the actions of Inspectors Thompson and Wolford in connection with Baird's removal of drawings from the mine office at approximately 4:00 - 4:30 a.m. on the morning of June 30, 1981. The Secretary argues that the inspectors did nothing illegal and that it was Baird who took the documents as required by the subpoena. Our review of the record, however, convinces us that Baird would not have travelled to the mine and taken the documents on his own. In the early hours of June 30 when the inspectors served Baird with the subpoenas and proceeded with him to the mine offices, Baird questioned the propriety of taking the documents from the mine and Thompson replied that the subpoena required it. To this extent, the entry and taking of the documents may be viewed as the action of MSHA. Thus, the next question is whether the removal of the documents was illegal or otherwise improper.

In deciding this question, control or custody of documents as well as ownership is critical in the determination of the propriety of documen production under subpoena. Service on one who has control of documents may be sufficient as against the owner. See, e.g., Mattie T. v. Johnston 74 F.R.D. 498, 502 (N.D. Miss. 1976), and authorities cited. However, the present case is different from the control involved in the cases relied upon by the Secretary. In those cases, the person subpoenaed exerted substantial control over the documents. Here, the evidence shows that Baird's control over the drawings was nominal, encompassing only the requirements of his immediate work assignment. In short, the subpoena did not allow Baird to take the documents without the permission of his superior. Thus, Judge Boltz's conclusion that there was no impropriety on the part of the inspectors in removing the drawings from Minerals' mine offices is erroneous. We are particularly disturbed by the MSHA inspectors' middle-of-the-night entry into private mine offices, without identification to appropriate agents of the operator. We strongl denounce Thompson's abuse of authority and reiterate our disapproval of the ill-controlled subpoena process agreed to by the parties.

Despite our conclusion that the exhibits were improperly obtained, we find no prejudice to Minerals. The outcome on the merits rested on adequate, independent grounds. Accordingly, we deem it inappropriate to invoke the extreme remedy of dismissal of the proceedings on the merits.

C. Mineral's objections to counsel's conduct after service of the subpoenas

1. Barkley's treatment of the subpoenaed Minerals employees

Minerals argues that counsel for the Secretary, Barkley, improperly questioned two of its employees who had been subpoenaed and that Judge Boltz failed to address this objection. Dealing with the latter assertio

is focused on Barkley's meeting with two subpoenaed Minerals draftsmen in advance of the resumption of the hearing on June 30, 1981, to discuss their testimony. These individuals were subpoenaed as MSHA's witnesses. While the authority for the issuance of subpoenas is through the Commissio (30 U.S.C. § 823(e) & 29 C.F.R. §§ 2700.54(a), .57 & .58), witnesses appear on behalf of the party requesting the subpoena. Because the draftsmen were witnesses for MSHA, it was reasonable and proper for Barkley to attempt to interview them before they gave their testimony.

Minerals also argues that Barkley improperly threatened the two employees by commenting that people had gone to jail trying to take refuge in subjective judgment. However, no one who heard Barkley's remark indicated that it was an assertion of an action to be taken or a prediction of events to follow. Although Barkley's comment was clearly improper and ill-chosen, evidencing a lack of understanding of proper prosecutorial conduct, it did not constitute an improper threat of criminal prosecution.

2. Barkley's release of the subpoenaed witnesses

Minerals' allegations of misconduct as to the release of the subpoenaed witnesses involves more comments by Barkley which Minerals asserts misled Judge Carlson. Immediately after Barkley's discussion with the two draftsmen discussed above, the hearing resumed. Barkley informed Judge Carlson that he would present all of his evidence through Baird and, therefore, was excusing the remaining subpoenaed witnesses. Barkley's stated reason for this action was effectively that the testimony of the other witnesses would be cumulative. This explanation was a distortion of the facts known to Barkley and certainly beneath the level of candor reasonably expected of an officer of the court. As Barkley explained at the sanctions hearing, the real reason for his excusing the other witnesses was that they had given him a "very pat kind of response or defense to their involvement." S. Tr. 800. Barkley should not have represented otherwise to the judge.

3. Barkley's examination and retention of subpoenaed documents

Minerals next argues that Judge Boltz erred in finding no impropriety in Barkley's examining all the produced documents, including those separated out by Minerals as irrelevant, on July 1, 1981, and that it was improper for Barkley to take and refuse to return for a period of months the daily reminder diaries of the Minerals employees.

All of Minerals' witnesses testified that because they were pressed for time at the mine on the morning of June 30, they gathered all possibly relevant documents to take to Denver to be sorted out later. In general,

30, the parties agreed to meet the next morning to exchange and examine documents. Nevertheless, prior to the document exchange Weber departed Denver and left in charge Dykers, a Minerals employee who is not an attorney. Weber did not explain to the judge or to counsel for the Secretary his intention to depart before the document examination took place. At the very least, we find it surprising that an attorney would allow documents to be produced to opposing counsel without first approving their release. Furthermore, Weber failed to give Dykers any instructions regarding the actions that should have been taken if a dispute arose. Given Weber's abdication of his adversarial responsibility, we cannot find wrongdoing in Barkley's examination of the produced documents.

We do not agree, however, with Judge Boltz's conclusion that there was no impropriety in Barkley's taking and refusing to return the diaries of the subpoenaed employees. A subpoena duces tecum does not allow retention of the originals of subpoenaed documents without permission. Whatever may be argued about the scope of the subpoena or the agreement of the parties, it is clear that Minerals did not agree to give the originals of the diaries to MSHA. In fact, the record supports the opposite conclusion. Minerals emphatically requested their return and the request should have been honored. Barkley was without authority to take and withhold the diaries and his actions are extremely troubling. Notwithstanding this conclusion, we do not perceive any fatal prejudice to Minerals' case on the merits in this instance as a result of Barkley's actions. In finding a violation, Judge Carlson noted that he relied on other unrebutted evidence and that the diary entries were too vague to be used. 5 FMSHRC at 676 n. 3.

D. Minerals' request for sanctions

We have detailed our serious concern regarding several aspects of the conduct of certain Department of Labor employees. Most troubling are Barkley's taking and retention of documents belonging to the operator, his misrepresentation to the judge as to the reason that he was excusing witnesses, and Thompson's abuse of authority, his middle-of-the-night entr into mine offices, and his taking mine documents. The record also indicates that Weber's performance as Minerals' counsel significantly contributed to the disruptions and in fact to some of the allegations of improprieties now raised by Minerals. We have noted further the procedura mismanagement of some aspects of this case by the Commission judge.

Minerals supports its arguments that sanctions should be imposed by relying primarily on criminal cases involving the Fourth and Fifth Amendments involving defendants' motions to exclude improperly obtained evidence, and on a series of cases involving defendants' attempts to have criminal indictments dismissed because of alleged prosecutorial

taken from the mine and the [illegible]
even courts dealing with the possible dismissal of criminal indictments have required a showing that the alleged prosecutorial misconduct has materially prejudiced the defendant's case. See, e.g., Laughlin v. Unites States, 385 F.2d 287, 292 (D.C. Cir. 1967). As explained above, we cannot conclude that the objectionable conduct of the Secretary's representatives prejudiced Minerals' case on the merits, or affected the substantive outcome of the citation and withdrawal order contest. We believe, however, that the noted serious deficiencies in the performance of the Secretary's personnel must be addressed. We find it appropriate in this instance to address those deficiencies by strongly urging the Secretary of Labor to review the noted objectionable performance by his employees and to take appropriate remedial action to ensure that such conduct by his representatives will not be repeated.

Accordingly, under all the circumstances of this case, we conclude that sanctions or disciplinary proceedings before the Commission are inappropriate.

III.

Conclusion

For the reasons set forth herein, we decline to impose the severe sanction of dismissal sought by Minerals. We affirm Judge Carlson's decision, and on the bases discussed above, we affirm Judge Boltz's order denying sanctions against the Secretary. 6/

Richard V. Backley, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

6/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission in this matter.

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEVA 82-152-R WEVA 82-369
WESTMORELAND COAL COMPANY	:	

BEFORE: Backley, Doyle, Lastowka, and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)("Mine Act"). The issue is whether a Commission administrative law judge abused his discretion by failing to reduce, in his decision on remand, the civil penalty imposed for a violation of 30 C.F.R. § 75.202, a mandatory roof control standard. For the following reasons we conclude that the judge's penalty assessment constitutes an abuse of discretion.

The complete factual background of this case is set forth in our decision remanding this matter to the judge. 7 FMSHRC 1338 (September 1985). It is sufficient to note here that in his initial decision the judge found that the foreman for Westmoreland Coal Company ("Westmoreland") had knowledge of the violative condition but failed to correct it "through indifference or lack of reasonable care." The judge concluded that the violation was the result of the "unwarrantable failure of the operator to comply with the law and ... of gross negligence." 5 FMSHRC 132, 137 (January 1983)(ALJ). Considering this negligence finding, and the other statutory civil penalty criteria set forth in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), the judge assessed a civil penalty of $8,000. 5 FMSHRC at 137. The Commission granted Westmoreland's petition for review.

to the overwhelming weight of the evidence." 7 FMSHRC at 1342. The Commission stated that it "[could] not conclude that the foreman's actions in allowing the work to proceed represent[ed] the degree of aggravated conduct intended to constitute an unwarrantable failure under the Act." The Commission also stated that "the violation ... did not result from Westmoreland's indifference, willful intent, or serious lack of reasonable care." 7 FMSHRC at 1342. Consequently, the Commission reversed the judge's unwarrantable failure finding. The Commission concluded, "[b]ecause the judge's penalty assessment rested in part on his determination that the foreman acted with indifference and without reasonable care, the case is remanded to the judge for reconsideration of the amount of civil penalty in light of our decision." 7 FMSHRC at 1343.

On remand, the judge acknowledged that the case was before him for the purpose of reconsideration of the amount of the civil penalty in light of the Commission's finding that the violation was not the result of Westmoreland's "indifference, willful intent, or serious lack of reasonable care." 7 FMSHRC at 1647 (October 1985)(ALJ). The judge revised his original finding that the violation was caused by Westmoreland's "gross negligence" and concluded instead that Westmoreland was negligent. 7 FMSHRC at 1648. In spite of his conclusion that the degree of Westmoreland's lack of care was less than originally found, the judge again assessed a civil penalty of $8,000.

A Commission judge is accorded broad discretion in assessing civil penalties under the Mine Act. This exercise of discretion, however, is not unbounded. The penalty must reflect proper consideration of the statutory penalty criteria. Sellersburg Stone Co., 5 FMSHRC 287, 290-94 (March 1983), aff'd 736 F.2d 1147 (7th Cir. 1984). When a judge's penalty assessment is at issue on review, the Commission must determine whether the penalty is supported by substantial evidence and whether it is consistent with the statutory penalty criteria. Pyro Mining Co., 6 FMSHRC 2089, 2091 (September 1984). When the Commission, using this standard, has concluded that the penalties assessed do not properly reflect the penalty criteria, it has assessed new penalties as warranted by the record. In some instances the resulting assessments have been higher, e.g., Pyro Mining Co., supra, in others, the assessments have been lower, e.g., United States Steel Corp., 6 FMSHRC 1423 (June 1984). In all instances, the objectives have been the same: fidelity to the record and effectuation of the enforcement scheme of the Act.

Here, the judge modified his prior finding of "gross negligence" in light of our conclusion that the violation did not result from Westmoreland's "indifference, willful intent, or serious lack of reasonable care." His determination of an appropriate penalty to be assessed necessarily should have been affected by his finding of a lesser degree of negligence. Instead, the judge imposed the same penalty without

Westmoreland was a large operator, that Westmoreland had a fairly substantial history of previous violations, and that Westmoreland's ability to continue in business would not be affected by the penalty imposed. 5 FMSHRC at 137. These findings, which were not disturbed on remand, are supported by substantial evidence. Based upon these findings, and upon the finding of a lesser degree of negligence, we conclude that a civil penalty of $5,000 is appropriate.

Finally, the violation of 30 C.F.R. § 75.202 was alleged in an order issued under section 104(d)(1) of the Act. 30 U.S.C. § 814(d)(1). Westmoreland requests that we modify the section 104(d)(1) order to a citation issued under section 104(a), 30 U.S.C. § 814(a), because of our previous reversal of the judge's finding of "unwarrantable failure." 7 FMSHRC at 1342. We conclude that the requested modification is appropriate See Consolidation Coal Co., 4 FMSHRC 1791, 1794 (October 1980).

Accordingly, we vacate the judge's assessment of a penalty of $8,000 for the violation of 30 C.F.R. § 75.202 and assess a civil penalty of $5,000. Further, we modify the subject order issued under section 104(d)(1) to a citation issued under section 104(a). 1/

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

1/ Chairman Ford did not participate in the consideration or disposition of this case.

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ADMINISTRATIVE LAW JUDGE DECISIONS

MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Docket No. CENT 85-20-M A.C. No. 39-00055-05537
v.	:	Homestake Mine
HOMESTAKE MINING COMPANY, Respondent	:	

DECISION

Appearances: Margaret Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Robert A. Amundson, Esq., Amundson, Fuller & Delaney, Lead, South Dakota, for Respondent.

Before: Judge Lasher

This matter arose upon the filing of a Petition for Assessment of Civil Penalty by Petitioner on February 13, 1985, pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 820(a) (herein the Act). Petitioner seeks assessment of a penalty against Respondent for violation of 30 C.F.R. 57.9-16 [1]/ which was described in Citation No. 2097700 issued August 29, 1984, as follows:

> "On the 2150 level the main haulage line was not being maintained in a safe condition the rail was loose with the track spikes being pulled loose, fish plates loose at the joints and track ties rotted creating a safety hazard to persons who must use the main line to haul the man trip, hauling personal (sic) to and from work places Heavy equipment travels the line hauling ore and materials to and from work areas a person could be seriously injured should the haulage motor derail."

---

[1] This regulation provides:

> "Roadbeds, rails, joints, switches, frogs, and other trackage elements on railroads subject to the control of the operator shall be designed, installed and maintained in a safe manner consistent with the speed and type of haulage."

> road from the stairway entranance (sic) to the G
> light at the curve and another area from H2 fan
> 34a Sill x-cut was not being properly maintained
> safe condition. The rail and rail spikes was pu
> loose from the track ties Fish plate Bolts loose
> ties rotted to a point that spikes would not hol
> in some areas the rail was starting to lean to o
> This condition creates a safety hazard for the m
> person who must travel this haulage line to haul
> al (sic) to and from work places on the mantrip.
> materials and supplies to and from work places.
> motorperson must also haul with a 6 ton motor 6-
> cars with a capacity of 3 tons each. A train de
> could cause serious injury to persons who must t
> this rail line many times during a shift."

The Citation, issued under Section 104(a) of the Act, als
charged that the violation was "significant and substanti
(herein "S & S").

In Secretary v. Consolidation Coal Company, 6 FMSHR
(1984), the Commission held that S & S findings may be ma
connection with a citation issued under Section 104(a) of
Considering this ruling in conjunction with U.S. Steel Mi
Company, 6 FMSHRC 1834 (1984), where the mine operator wa
ed to contest S & S findings entered on Section 104(d)(1)
citations in a penalty case, it is concluded that S & S f
contained in a Section 104(a) Citation similarly are prop
reviewable in this penalty proceeding.

The matter came on for hearing in Lead, South Dakota
November 13, 1985. Both parties were ably represented.

The Secretary contends that Respondent did not maint
track in question in a safe manner, that the track in que
was deteriorating and in need of repair, that Respondent
have known that the track was not being properly maintain
was unsafe, that such violation was S & S, and that the p
assessment of $276.00 originally proposed administrativel
Secretary should be assessed.

> hat the safety standard cited,
> tutionally vague, i.e., that it
> air notice of what is required
> anner consistent with speed and
> maintains that the Secretary fa
> the alternative if a violation

he level to the other for approximately one mile and is used f
he transportation of men as well as materials (Tr. 15, 16, 60,
50). The Inspector felt that approximately 3000 feet of track
as not being properly maintained and that 800 feet was in "bad
epair". (Tr. 61, 170). There is approximately 400 miles of
rack in the entire mine (Tr. 91). However, only three levels
ere inspected on the day the Citation was issued.

On the inspection day the Inspector observed Granby
re-haulage cars on the track: these cars are approximately 7'
ong, 5' wide and 5' high, carry 3-5 tons of ore, and are pulle
y 6-ton motors (locomotives)(Tr. 13, 16, 160, 174). In
ddition, the motors also pull man cars which are used to
ransport 4 to 8 miners to and from their workplace at the
eginning and end of the shift (Tr. 18-21, 65, 150, 198, 204,
10, 327). Both ore-haulage cars and man cars move on iron
heels and both are braked by the motor (Tr. 19, 79). The leng
f track described in the Citation was "zero-grade", that is,
evel (Tr. 175-176).

Reliable and probative evidence of record established that
he following defects in the track existed at the time of
nspector Sprague's inspection:

1. Loose rail (Tr. 24, 162-164, 188, Ex. P-1). At one ar
ear the H-2 fan) the track was spread more than 19 inches whi
ould cause derailment (Tr. 187, 188, 337).

2. An area along a wood track tie where the tie had been
oving back and forth (Tr. 26; Ex. P-2).

3. An area of track where a track spike was "pulled out"
d was not holding the rail in place on one side and where a
rack spike on the opposite side of the rail was missing (Tr. 2
; Ex. P-3).

4. Areas of track where the wood track ties were rotted a
here track spikes were entirely missing on one track tie (Tr.
, 29, 84, 85, 187, 188; Ex. P-4). In abating the violative
ondition of the track, Respondent's track repairman, Dennis
lluweit, replaced 25 to 35 ties out of a possible 480 present
the 1000 foot section he worked on (Tr. 154, 172, 173, 201).

P-6). As to this condition, Respondent's witness, track repa man Dennis Willuweit, conceded that the "worst place" a fishp could break was in the middle and that "with a fishplate brok right in the middle, the joint could move enough to let a car derail" (Tr. 184-186).

7. An area of track where the top flange of a piece of was completely worn away and could break any time (Tr. 31, 278-283; Ex. P-7).

8. An area of track where the bolts holding a fishplate were loose and also deteriorated to a point that the threads "gone" so that the bolts could not be tightened (Tr. 31; Ex. P-8).

9. Rust, rotted ties, loose spikes and deterioration we prevalent in various of the track areas mentioned above (Tr. 73, 91, 94, 95, 185, 198-200, 215, 226, 233, 234). Inspector Sprague summed up the general condition of the track in quest as follows:

"For the most part, there was either a loose section; sp missing; ties rotted out. There had been some areas on the f end that had been repaired, some new installation" (Tr. 32, 3

It is concluded from considerable probative evidence of record showing the general condition of the track that it was being properly maintained and that work was not being done to keep the track in a safe, manner (Tr. 33, 35, 51, 66, 67, 96, 212, 213, 226, 236). This situation had been allowed to cont "for quite some time" (Tr. 35). Mine management knew or shou have known of the defective conditions since they travelled t area daily and the condition had been reported to them (Tr. 47-49, 213, 220, 274). Also, as part of his inspection, In- spector Sprague talked to a motorman and other miners who indicated that the track had been in such condition "for quit some time". The motorman reported to Inspector Sprague that

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2/ A fishplate is a piece of angle iron approximately 3/4" thick, 18" long and 1-1/2" wide which has four bolt holes. F plates, who purpose is to keep rail in alignment so that the joints don't separate or move from side to side, are bolted t each side of a rail (Tr. 30, 63, 270).

aation of the cause of derailments:

> "Just the normal condition of the track, with the fishplates being broken, not holding the joints together; no track spikes in the ties; the rotted condition of ties, which would, in no way, hold the rail in position, and it could very easily cause misalignment of the joints which could cause derailment." (Tr. 41).

Derailments are a relatively common occurrence at this mine 38, 82, 205, 261, 291). Usually, when a derailment occurs, equipment simply drops off the track (Tr. 83, 188, 283). ording to the Inspector, if the motor were to derail it would bably stop instantly. On the other hand, if an ore car were derail, the motorman might travel half a mile before becoming e of it (Tr. 84). In this connection it should also be noted there were 3 curves in the track on the 2150 level which the orman could not see around (Tr. 191, 205).

The track in question is 18-gauge, that is, the distance veen the rails is 18 inches (Tr. 22, 79, 155). The rails nselves are 20 to 25 feet in length and are attached by spikes vood ties placed at 2-foot intervals along the track (Tr. 30, 61, 62, 88, 285). Track gauge must spread to 19-20 inches ore derailment occurs, i.e., the equipment drops between the s (Tr. 155-158, 282); derailment can also occur if the rails e inward to a gauge of 17 inches. Should this happen, the ipment would drop off to the outside of the rail (Tr. 158, .

As indicated heretofore the hazard posed by the track ects described by the Inspector - the existence of which were the most part admitted by Respondent - was derailment of (1) motor (locomotive), (2) the trailing haulage cars, and/or (3) trailing man cars (Tr. 38, 39, 41, 42, 86, 292). Derailments ally occur because of such track conditions (Tr. 82, 83, 206, 294, 295), and it was very likely that such derailments cidents) would occur (Tr. 38, 41, 52, 106. 179, 187-188, 203, -206, 325, 334).

Track conditions and defects which cause derailments are afe (Tr. 69, 114, 204-205, 236, 337-339, 343). Thus, should a ilment occur when miners were being hauled on a man car ntrip) the miners could have been injured from being thrown nd in the man car, from being thrown out of the man car, from

even fatal (Tr. 46, 111-113, 314-317) and were reasonably likel to occur as a result of a derailment (Ct. Exs. 1 and 2; Tr. 46, 132, 161-162, 198-200, 204-206, 240-244, 333-334, 347-348).

30 C.F.R. § 57.9-16 mandates that the track be maintained a safe manner consistent with speed of haulage. The estimates various witnesses and sources had considerable range. Although at the hearing Respondent's witnesses testified that Respondent "policy" was that the motormen would not travel faster than-or should slow down to (a) 2 mph (Tr. 151) or (b) 2 to 3 mph (Tr. 178), or (c) 4 mph (Tr. 179, 325), in correspondence to the Secretary's counsel and to the undersigned prior to the hearing (Ct. Exs. 1 and 2), Respondent's Director of Safety and Health indicated that the following was one of the issues upon which i built its case:

> "... Speed of travel of the locomotive and cars would never exceed 10 miles per hour with normal speed being 5-7 miles per hour."

Even accepting Respondent's evidence at the hearing that t speed was 2, 3, or 4 mph, and I do not so find, the record es- tablihes that the speed actually was left to the judgment or discretion of the motorman who was supposed to slow down when m were seen walking along the track or where track defects were noted (Tr. 179, 203). It is clear that there were curves in th 2150 level track where the motorman could not see what was ahea (Tr. 191, 204-205). In its post-hearing brief (p. 3) Responden characterizes the speed at from 2-10 mph, and concedes that the speed could be up to 10 mph. (Ct. Exs. 1 and 2; Tr. 116, 242). Finally, Inspector Sprague guessed the speed at 6-7 mph (Tr. 22 71), and the Secretary's expert witness, Michael Sheridan, base his opinion on a speed of 5-7 mph (Tr. 117). This latter speed is well-supported in the evidence and provides a reasonable foundation for the opinions and findings based thereon, particu larly those of the Secretary's witnesses relating to the questi of the safety of the 2150 level track. Further, in the back- ground of the entire record, the opinion of Inspector Sprague a to the bearing of the speed factor on the question of track safety is persuasive:

> "It doesn't really matter what speed you're going. If the rail is in a deteriorating condition, it could fall off at any time. I don't think speed really has a bear ing on it, as far as whether you go off the track or ho many could go off the track." (Tr. 97).

ne quality of track maintenance varied throughout the mine and hat the track in areas of the mine where there was greater roduction were better maintained (Tr. 179, 198-200 203, 273-274 92, 319-320) than the track on the 2150 level and areas where here was less production. The testimony of Mr. Willuweit in his connection is significant:

"JUDGE LASHER: Do you have an opinion of whether or not the 2150 section--area of track that you performed these repairs on after the citation was issued--whether that at that time, was any different from most of the other track areas of the mine?

THE WITNESS: It was was-- it was a lot different than area that are used for mass haulage, where they have to move a lot of rock, but it was similar to a lot of other areas of the mine, where your use is minimal.

JUDGE LASHER: Okay. You're saying that, at this time, thi area of this track was used for what?

THE WITNESS: Basically, it was used to haul four to eight men into their work area and out, and haul a few supplies to them and haul a little bit of rock occasionally, and tha was it.

X X X X X X X X X X X X

JUDGE LASHER: So are you saying it was in a state of highe repair than the areas that haul the ore? - or less repair?

THE WITNESS: Less repair.

JUDGE LASHER: And why would that be?

X X X X X X X X X X X X

THE WITNESS: It's not carrying the traffic. And if you have a timber track off, and you're going at a reasonable speed, basically it is--it is an in inconvenience. Now, in an area where you are trying to get some work done and you're trying to move rock and you have wrecked cars, or derailments, then they start costing you money because then they are affecting production; they're not affecting just one man. Instead of moving 300 to 400 ton of rock

that day, if they have derailments they may only move half the rock, and that affects the output of the rock at the mine, so the levels where they have--where they move a lo of rock, or where they move a lot of men, they move a lot of supplies, they have to keep that in a lot better condition than you have to keep the levels where they just don't use the track much." (Tr. 198-200).

The 1977 Mine Act is remedial legislation intended to promote the safety of miners. It would seem that the regulation's provision that track be maintained in a safe manner consistent with "type of haulage" if anything contemplates a higher standard of maintenance on track where miners primarily are being transported - such as the 2150 level - rather than t lesser standard evidenced in this record. It is concluded on basis of the various findings above that the rails and track elements on the 2150 level were not maintained in a safe manne consistent with the speed and type of haulage and that the violation described in the Citation did occur.

We next take up Respondent's contention that the cited regulation is unconstitutionally vague and fails to give the m operator "fair notice" of what is required to maintain track " a safe manner consistent with the speed and type of haulage". Such is found to lack merit and is rejected. Safety standards such as 30 C.F.R. § 57.9-16 cannot be considered in a vacuum. Generally when a safety regulation is examined for meeting due process certainty requirements, it must be looked at "in light the conduct to which it is applied." Ray Evers Welding Co. v. OSHRC, 625 F.2d 726, 732 (6th Cir. 1980). General terms such "unsafe" or "dangerous" appear frequently in federal safety an health standards. This approach has been recognized as necess where narrower terms would be too restrictive. Standards, tha is to say, must often be made "simple and brief in order to be broadly adaptable to myriad circumstances." Kerr McGee Corporation, 3 FMSHRC 2496 (1981). In Alabama By-Products Corporation, 4 FMSHRC 2128 (1982) the issue was whether the Secretary could enforce a similarly worded standard requiring machinery to be kept in "safe operating condition." The Commission established the following test:

> [I]n deciding whether machinery or equipment is in saf or unsafe operating condition, we conclude that the alleged violative condition is appropriately measured against the standard of whether a reasonably prudent person familiar with the factual circumstances surroun ing the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize

fatalities. The Secretary met its burden of establishing a
s between the widespread track problems and the effect such
d have on the safe operation of equipment on the track. As
Commission has noted in other contexts, and contrary to the
ral thrust of Respondent's argument, the cited regulation,
iring maintenance of a mine part in a safe manner, is aimed
he elimination of potential dangers before they actually
me present dangers. Here, some of the track conditions were
n to have already become present dangers. See Secretary v.
sburg & Midway Coal Mining Company, 8 FMSHRC 4, 6 (1986).
ondent's vagueness challenge is rejected.

The final question raised by Respondent is whether the
ect Citation cited a violation which was "of such nature as
d significantly and substantially contribute to the cause and
ct of a ... mine safety or health hazard" as that phrase is
in the Act.

The Commission has held that a violation is properly de-
ated S & S "if, based on the particular facts surrounding
violation, there exists a reasonable likelihood that the
rd contributed to will result in an injury or illness of a
onably serious nature." Cement Division, National Gypsum
3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6
RC 1, 3-4 (January 1984), the Commission explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

The Commission subsequently explained that the third element
he Mathies formula "requires that the Secretary establish a

6 FMSHRC 1834, 1836 (August 1984), and also emphasized th
accordance with the language of section 104(d)(1), it is
contribution of a violation to the cause and effect of a
that must be S & S. See 6 FMSHRC at 1836.

It has previously been determined that a violation
that the failure to maintain the track in a safe manner
buted to the cause and effect of a safety hazard, i.e.,
derailment accident, that it was likely that such derail
would result in injuries, and that there was at least a
able likelihood that such injuries would be of a reasonal
serious nature or fatal. The record indicates several i
including a severed finger, which resulted, directly or
directly, from derailments in the past. The fact that m
serious injuries - or fatalities - have so far been avoi
fortunate, but not determinative. Secretary v. Ozark Ma
Company, 8 FMSHRC ____, Docket No. LAKE 84-96-M, (decid
February 28, 1986). See also Secretary v. U.S. Steel Mi
Inc., 7 FMSHRC 327, 329 (1985). It is concluded that th
lation was properly designated S & S.

There remains the determination of an appropriate p
Based on stipulations of record, it is found that the Re
is a large gold mine operator (Tr. 221) with a payroll o
approximately 1,350 employees at its mine near Lead, Sou
Dakota; that a reasonable penalty assessment will not je
its ability to continue in business; and that upon notif
of the violation it proceeded in good faith to promptly
violative conditions cited (Tr. 8, 9, 93). The Secretar
evidence with respect to Respondent's history of violati
reflects 253 violations during the 2-year period prior t
issuance of the subject citation. Absent further explic
characterization thereof in the record, and in view of t
size it is concluded that such is a moderate history of
violations and that such mandatory penalty assessment cr
should provide no basis for increasing the penalty amoun
otherwise warranted. Based on the findings specified ab
further found that (1) this was a relatively serious vio
and (2) that Respondent's management was aware of the de
condition of the track at the 2150 level and failed to e
reasonable care in not recognizing the hazards posed the
in not maintaining the track in a safe manner. This con
ordinary negligence.

After weighing these various assessment considerati
it appearing that Respondent's belief that the various d
track conditions did not amount to unsafe track was sinc
advanced, a penalty of $300.00 is found to be appropriat

Michael A. Lasher, Jr.
Administrative Law Judge

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c

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEST 84-134-M A.C. No. 48-00155-05502 K28
v.	:	Docket No. WEST 85-170-M A.C. No. 48-00155-05503 A K 28
BIG HORN CONSTRUCTION CO., BERNARD BANKS, BRUCE PARKER, JAMES WAGAMAN, Respondents	:	Docket No. WEST 85-171-M A.C. No. 48-00155-05504 A K28 Docket No. WEST 85-172-M A.C. No. 48-00155-05505 A K28 (Consolidated) Alchem Mine

DECISION APPROVING SETTLEMENT

Before: Judge Morris

These consolidated cases are civil penalty proceedings initiated by the petitioner against the respondents pursuant to Section 110 of the Federal Mine Safety and Health Act of 1977, U.S.C. § 820.

Prior to a hearing the petitioner filed a motion seeking approval of a settlement agreement entered into by the parties.

1. The agreement reflects that at the time of the alleged violations respondent Big Horn Construction Company (Big Horn) was the corporate contractor-operator of the Alchem Mine, a tro mine in Sweetwater County, Wyoming. Further, respondent Bernar Banks (Banks) was acting as master mechanic at the mine and as agent for Big Horn; respondent Bruce Parker (Parker) was acting as foreman at the mine and as an agent for Big Horn; and respondent James Wagaman (Wagaman) was acting as project manage at the mine and as an agent for Big Horn.

2. In WEST 84-134-M respondent Big Horn is charged under section 110(a) of the Act, in Citation No. 2083234 and Order No 2083235, with violating the mandatory safety standard publishe at 30 C.F.R. § 57.14-36.

3. In WEST 85-170-M respondent Banks is charged under section 110(c) of the Act with knowingly authorizing, ordering or carrying out the two foregoing violations as an agent of Bi

or carrying out the same two violations as an agent of Big Ho

5. In WEST 85-172-M respondent Wagaman is charged with knowingly authorizing, ordering, or carrying out the same two violations as an agent of Big Horn.

6. The citations, the original assessments and the prop dispositions for the violations of 30 C.F.R. § 57.14-36 are a follows:

Respondent	Citation & Order Number	Assessment	Settlement
Big Horn	2083234	$ 800	$ 800
	2083235	1,000	1,000
Banks	2083234	500	375
	2083235	600	450
Parker	2083234	600	450
	2083235	700	525
Wagaman	2083234	700	525
	2083235	800	600

The proposed settlement constitutes a payment in full of originally proposed civil penalties against Big Horn and a 25 reduction of the originally proposed civil penalties against three individual respondents.

Discussion

In support of their proposed settlement the parties have submitted information relating to the statutory criteria for assessing civil penalties as set forth in 30 U.S.C. § 820(i).

I have reviewed the proposed settlement and I find it is reasonable as well as in the public interest. The agreement should be approved.

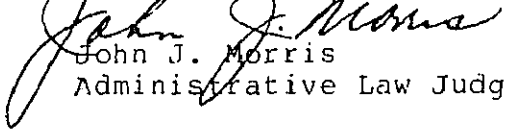
Accordingly, I enter the following:

ORDER

1. The settlement agreement is approved.

2. Citation No. 2083234 and Order No. 2083235, as modif are affirmed as to the respondents in all consolidated cases.

3. In WEST 84-134-M the proposed civil penalty of $1,80 against respondent Big Horn is affirmed.



John J. Morris
Administrative Law Judge

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/blc

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Docket No. LAKE 85-47
Petitioner	:	A.C. No. 33-02929-03505
v.	:	North Mine
WILMOT MINING COMPANY,	:	
Respondent	:	

DECISION

Appearances: Patrick M. Zohn, Esq., Office of the Solicitor U.S. Department of Labor, Cleveland, Ohio, for Petitioner;
Thomas Eddy, Esq., Eddy & Osterman, Pittsburgh Pennsylvania, for Respondent

Before: Judge Fauver

The Secretary of Labor brought this action for civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following:

FINDINGS OF FACT

1. At all relevant times, Respondent operated a strip mine known as North Mine, which produced coal for sale or use in or substantially affecting interstate commerce.

2. On May 25, 1984, at about 2:00 p.m., a vehicle accident occurred in the 001-0 pit of the North Mine, resulting in the death of John D. Schrock, who was the pit foreman.

3. Schrock was operating a Terex 72-41 front-end loader on a pit road that had a 20% grade. As he was exitin the pit, he stopped about 100 feet from the pit bottom and began to back up, to make room for a descending coal truck. Schrock's vehicle rolled backward downhill, went off the road, struck the face of the highwall, and rolled over.

4. The vehicle did not have a rollover protective structure. The cab roof was crushed and Schrock was fatally injured when the vehicle rolled over.

5. The vehicle rolled downhill and went out of control because it did not have adequate brakes.

6. On May 24, 1984, the day before the accident, Schrock left his regular vehicle, a 510 International Harvester front-end loader, in the pit so that a part could be removed for repair. A short time before May 24, Schrock told the General Manager, Harold Bain, that he was having starter trouble on his 510 International Harvester. Bain said that whenever Schrock was ready, he would take the starter to Dover "and let the electrial people rebuild" it (Tr. 86). He also said that a 910 Caterpillar was available for Schrock's use and that, when the starter finally gave out, Schrock should "go to the garage, and get the 910 Caterpillar" (Tr. 86). However, Schrock decided to use another vehicle as a substitute, a Terex 72-41 front-end loader.

7. The Texex 72-41 loader was not equipped with a rollover protective structure. Schrock's regular vehicle, the 510 International Harvester, and the vehicle offered by Bain, the 910 Caterpillar, were both equipped with a rollover protective structure.

8. Schrock made several trips into the pit with the Terex 72-41 loader on May 25. At about 7:00 a.m., the pit crew went to their work areas. Schrock met Glen Shoup, a front-end loader operator, at the pit about 7:20 a.m., and discussed plans for loading coal from the pit. Shortly thereafter, Schrock used the Terex 72-41 loader in the pit to clear overburden from the coal seam so Shoup could load coal into coal trucks. Schrock left the pit about 10:00 a.m., using the Terex 72-41 loader for transportation, and drove to another part of the mine. He returned with the loader to continue the clearing process in the pit two other times, and left to travel to other areas of the mine.

9. On May 25, not very long before the accident, Bain saw Schrock with the Terex 72-41 loader near the road to the pit and gave him the employees' paychecks to deliver in the pit. He knew, or by the exercise of reasonable judgment should have known, that Schrock would use the Terex loader to go into the pit to deliver the checks. Bain also knew that the Terex 72-41 loader did not have a rollover protective structure.

having brake trouble. Hoover went to get tools to check the brakes, but Schrock drove off before Hoover could inspect the brakes. Schrock then drove into the pit, where the accident occurred about 2:00 p.m.

11. Bain was in charge of annual refresher training at the mine. However, he conducted no refresher training in 1982, in 1983, or in 1984 up to the date (May 26) when the Federal inspection team requested to see the annual refresher training records. Bain did not provide refresher training in those periods because in his opinion there were not enough miners to justify the expense of a training class.

12. Following an investigation of the fatal accident, Federal Mine Inspector Ray Marker issued three citations charging violations of mandatory safety standards:

a. Citation 2327028, charging a violation of 30 C.F.R. § 48.28 (requiring a minimum of 8 hours annual refresher training for each miner).

b. Citation 2327029 charging a violation of 30 C.F.R. § 77.403a(a) (requiring rollover protective structures on front-end loaders).

c. Citation 2327030, charging a violation of 30 C.F.R. § 77.1605(b) (requiring adequate brakes on mobile equipment).

13. Respondent is a small operator. At the time of the citations, Respondent employed 14 miners, producing about 300 tons of coal a day.

14. In each instance, Respondent made a good faith effort to achieve rapid compliance after a violation was charged in the above-cited citations.

the North Mine.

DISCUSSION WITH
FURTHER FINDINGS

Citation 2327028

This citation alleges that Respondent's 14 miners did not receive the required 8 hours refresher training in 19 or 1983, in violation of 30 C.F.R. § 48.28(a), which prov.

> Each miner shall receive a minimum of 8 hours of annual refresher training as prescribed in this section.

Respondent acknowledges that there was no refresher training of its miners in 1982 or 1983, but it argues, am other things, that:

(1) The regulation impliedly requires that a miner be employed at least 12 months to be covered by the annual refresher training provision.

(2) The Secretary has not shown that any of the 14 miners was a covered miner, i.e., not an exempt supervisor, and was employed at least 12 months without training.

This argument is not persuasive. The Secretary made prima facie case of a violation by showing that 14 miners were employed at the time of the inspection, that the min was a going concern in 1982 and 1983, and that no refresh training was conducted for any miner in 1982 or 1983. Res did not rebut this prima facie case by any evidence that there were no covered miners in 1982 or 1983 or that the required training was in fact conducted. Instead, Respon evidence showed that refresher training was not conducted for over two years because the General Manager was waitin for a larger employment body (than just a few miners) to justify, in his opinion, the expense of refresher trainin

Respondent further argues that the regulation is stitutionally vague as to the type of refresher training red. This argument is rejected. Section 48.28(a) es refresher training "prescribed in this section," ection 48.28(b) spells out in ample detail the type of sher training required.

Finally, Respondent contends that the proposed penalty 00 is "grossly excessive and unreasonable as a matter ." This contention is apparently based upon the l that Schrock, as a supervisor, was not subject to the sher training requirement and, therefore, a violation ction 48.28(a) had no connection with the fatal accident. argument does not render the violation nonserious. The rements of section 48.28 are at the heart of a preventive and health program for miners. Failure to provide equired training (see section 48.28(b)) could jeopardize iner and expose other persons to dangers that could from a failure to follow the safety, health, and job involved in the refresher training. Respondent has strated a negligent, lax, and wholly unjustified attitude l this mandatory and important safety and health training rement. Considering all of the six criteria for civil ties in section 110(i) of the Act, I find that a penalty 00 is appropriate for this violation.

Citation 2327029

This citation charges a violation of 30 C.F.R. § 77.403a(a), requires that "All rubber-tired ... front-end loaders hat are used in surface coal mines or the surface work of underground coal mines shall be provided with ver protective structures ...."

It is undisputed that Schrock operated a front-end that had no ROPS, drove it into the pit, and was ly injured when the vehicle rolled over and crushed

Respondent contends, among other things, that:

1. John Schrock willfully acted in contravention of his job responsibilities as mandated by the operator when he operated the Terex loader in the pit.

2. This act of malfeasance was unforseeable by the operator.

3. John Schrock risked injury only to himself by operating the Terex in the pit.

4. The operator was not negligent as a matter of law.

I find that the General Manager knew that Schrock was operating a vehicle without ROPS when he gave Schrock paych to be delivered in the pit and that he knew or should have known that it was probable that Schrock would drive that vehicle (the Terex) into the pit to deliver the paychecks. Respondent was therefore negligent in allowing Schrock to operate the Terex in the pit. Because of the gravity of this violation, I find that this conduct was gross negligen

Apart from Bain's action in allowing Schrock to drive the Terex into the pit, Schrock himself was grossly neglige in driving the Terex into the pit. Because Schrock was a supervisor representing Respondent, his gross negligence imputed to Respondent.

The gravity of this violation -- operating a front-end loader in a coal pit without ROPS -- is most serious becaus in the event of an accident, a rollover could result in the death or serious injury of the vehicle driver.

Considering all of the six criteria in section 110(i) for assessing civil penalties, I find that a civil penalty of $2,000 is appropriate for this violation.

Citation 2327030

This citation charges a violation of 30 C.F.R. § 1605(which provides:

loaders shall also be equipped with parking brakes.

About 15 minutes before the fatal accident, Schrock drove the Terex front-end loader into the equipment parking area and told a mechanic that he was having brake problems. However, before the mechanic could get his tools and come back to examine the brakes, Schrock drove off and entered the pit knowing he had defective brakes. A careful test of the brakes after the accident showed that the brakelines, wheel cylinder and hydraulic brake fluid lines were all intact, i.e., they had not leaked because of the accident, but the master cylinder and auxiliary brake cylinder were very low in brake fluid. When the brakes were tested on level ground, it took 36 feet to stop with the amount of fluid found after the accident, but when fluid was added to the normal level, it took only five to ten feet to stop. On a steep road, such as the pit road with a 20% grade, the Terex loader would have virtually no brakes at all. At the hearing, the General Manager, Bain, testified that Schrock's act of driving the Terex on the pit road, with effectively no brakes, was, in Bain's opinion, tantamount to suicide. Schrock knew that the brakes were defective, and told the mechanic about the problem. However, for some unknown reason he drove off before the mechanic could inspect the brakes.

I find that Schrock's act of driving the Terex into the pit with known defective brakes was an act of gross negligen which greatly endangered himself and other persons who might have been injured in an accident involving the Terex. Because of his supervisory position, Schrock's gross negligence is imputed to Respondent.

Considering all of the six criteria in section 110(i) for assessing penalties, I find that a civil penalty of $5,000 is appropriate for this violation.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in this proceeding.

2. Respondent violated 30 C.F.R. § 48.28(a) as charged in Citation 2327028. Respondent is ASSESSED a civil penalty

penalty of $2,000 for this violation.

4. Respondent violated 30 C.F.R. § 77.1605(b) as charged in Citation 2327030. Respondent is ASSESSED a civil penalty of $5,000 for this violation.

ORDER

Respondent shall pay the above civil penalties in tl total amount of $7,500 within 30 days of this Decision.

William Fauver
Administrative Law Ju

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MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Docket No. KENT 83-212 A.C. No. 15-10339-03516
v.	:	No. 11 Mine
PYRO MINING COMPANY, Respondent	:	

DECISION

Appearances: Carole M. Fernandez, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
Steven P. Roby, Esq., Pyro Mining Company, Providence, Kentucky, for Respondent

Before: Judge Fauver

This case was remanded by the Sixth Circuit Court of Appeals for reconsideration of the civil penalty assessments and for findings on the factors whether the penalties assessed would affect Pyro's ability to continue in business and whether Pyro demonstrated good faith in attempting promptly to abate the violations.

I find from the record that, with regard to each of the charges, Respondent abated the violative condition promptly after receiving notice from MSHA. Therefore, there was good faith in attempting to achieve prompt abatement of the violations; I considered this fact in my original assessments.

I also find from the record that Respondent is a large operator, a fact which I considered in my original assessments. At the time of the citations, the No. 11 mine employed 288 miners and had a daily production of 3,500 tons. Pyro No. 11 is one of many mines owned by Pyro Mining Company.

raised by Respondent. Respondent made no claim or a
nor was there any evidence or indication, that any p
assessed would have an adverse effect upon Pyro's ab
continue in business. Indeed, Respondent acknowledg
absense of such defense in its brief on remand, by s
that it "will not be submitted that Pyro Mining Comp
be unable to continue in business or that it must cu
its operation by paying either the $7,000.00 origina
proposed to be assessed or the $12,000.00 actually a
(Resp. Br. p.2).

In summary, I find that:

(1) Good faith was demonstrated by Respondent in attempting to achieve prompt abatement of each relevant violation after notice of the violation by MSHA.

(2) The civil penalties assessed in this case will not have an adverse effect on Respondent's ability to continue in business.

Both of the above facts are clear as a matter of rec
they were considered by me in reaching my original p
assessments. The civil penalties assessed in my ori
decision as to the violations affirmed by the Sixth
are therefore not changed in this decision on remand

With respect to the remaining charge (Citation
for a violation of 30 C.F.R. § 75.1725(a), the Court
my finding of gross negligence and indicated that no
could be found since I found that Respondent was not
before the accident occurred.

Lack of negligence does not preclude a finding
violation under this statute. I find that Responden
the cited standard as charged because a defective tr
was used before and after the accident, up to the ti
notified Respondent of the violation. In compliance
Court's decision, I find that this violation was not

of the six statutory criteria for a civil penalty, the al
of negligence warrants a major reduction in my original
of $5,000 for this violation. In full consideration of
other five statutory criteria, including my original find
of high gravity of this violation, which contributed to
fatality, I find that a penalty of $1,000 is appropriate
for this violation,

In summary, on remand I ASSESS Respondent the follo
civil penalties:

Citation	Civil Penal
2075924	$1,000
2075231	7,000
2075232	5,000
2075233	200
	$13,200

ORDER

WHEREFORE IT IS ORDERED that Respondent shall pay t
above-assessed civil penalties in the total amount of
$13,200 within 30 days of this Decision.

William Fauver
William Fauver
Administrative Law Ju

Distribution:

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April 4, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDI Docket No. WEST 85-45- A.C. No. 42-01760-055(
v.	:	Anderson Milling
ANDERSON MILLING COMPANY, Respondent	:	

DECISION

Appearances: James H. Barkley, Esq., Office of the Soli
U.S. Department of Labor, Denver, Colorad
for Petitioner;
Mr. J.L. Anderson, Anderson Milling Compar
Cross, Utah,
pro se.

Before: Judge Morris

This case, heard under the provisions of the Federa
Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.,
Act), arose from an inspection of respondent's lime proc
plant on September 7, 1984. On that date a federal min
inspector issued a citation for the violation of a safet
regulation promulgated by the Secretary of Labor pursua
Act. The respondent, Anderson Milling Company, contest
Secretary's petition for the imposition of a civil penal

The case was heard in Salt Lake City, Utah on Febr
1986 with both sides presenting evidence. Neither part
desired to file post-trial or other post-hearing submis

Issues

The issues are whether respondent violated the reg
is so, what penalty is appropriate.

Guards

56.14-1 Mandatory. Gears; sprockets; chains, drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons and which may cause injury to persons, shall be guarde

Summary of the Case

On the day of his visit to the worksite Edward Cordovo Sc a federal mine inspector, found that the head pulley of respondent's elevated conveyor should have been guarded. Pinch points were formed where the conveyor belt goes over the rolle (Tr. 13-15). The pinch points were an arm's length, about 18 inches, from an adjacent platform that provided access to the area (Tr. 14, 15). The operator's employees indicated there h been some spills; in addition, wire and wood could have become entangled in the machinery (Tr. 14). Maintenance would also b performed in the area of the pinch points (Tr. 15, 16).

Witness Anderson, citing his answer filed in the case, testified that other federal inspectors had not considered the pinch points to be a problem (Tr. 30). In addition, this particular item had been previously approved for safety (Answe

The company has been accident free.

This particular conveyor only runs six minutes out of 24 (Tr. 28, 31).

Discussion

The evidence establishes that the pinch points were expos moving parts. Further, a workman doing maintenance would be within 18 inches of this hazard. He could become entangled in the pinch points. The potential for a fatality or serious inj existed in these circumstances.

Respondent also asserts that a previous MSHA inspector approved the lack of a guard at this location. In short, respondent invokes the doctrine of collateral estoppel against M

I have previously refused to apply the doctrine in simila circumstances. MSHA inspectors have different areas of ex-

Safety Act. Servtex Materials Company, 5 FMSHRC 1539 (198
Kennecott Minerals Company, 6 FMSHRC 2023, 2028 (1984).
the Commission decision concerning estoppel in King Knob
Company, Inc., 3 FMSHRC 1417 (1981).

The citation should be affirmed.

Determination of an Appropriate Penalty

Section 110(i) of the Act requires the Commission, i
penalty assessments, to consider the operator's size, its
negligence, its good faith in seeking rapid compliance, i
history of prior violations, the effect of a monetary pen
its ability to remain in business, and the gravity of the
violation itself.

The evidence shows that respondent is quite small wi
one or two employees. It further shows that the operator
negligence is low inasmuch as the photographs indicates t
location is not open and obvious. The operator establish
faith in that it rapidly abated the violative condition.
company had four prior violations in the two-year period
September 6, 1984. The evidence further indicates that t
company discontinued operations for a two month period be
the week before the hearing. This was an annual downturn
gravity of the violation is severe if an accident should

On balance, I deem that a penalty of $25 is appropri

Conclusions of Law

Based on the entire record and the factual findings
the narrative portion of this decision, the following con
of law are entered:

1. The Commission has jurisdiction to decide this c

2. Respondent violated 30 C.F.R. § 56.14-1.

3. The contested citation should be affirmed and a
assessed therefor.

ORDER

Based on the foregoing facts and conclusions of law
the following order:

1. Citation 2358836 is affirmed.

3. Respondent is ordered to pay the sum of $25 to MSHA hin 40 days of the date of this decision.

John J. Morris
Administrative Law Judge

tribution:

es H. Barkley, Esq., Office of the Solicitor, U.S. Department Labor, 1585 Federal Building, 1961 Stout Street, Denver, CO 94 (Certified Mail)

J. L. Anderson, Anderson Milling Company, 2116 South 750 t, Woods Cross, UT 84087 (Certified Mail)

c

April 7, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDI
	:	Docket No. PENN 86-43
	:	A. C. No. 36-00917-036
v.	:	Lucerne No. 6
HELVETIA COAL COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Merlin

The Secretary of Labor has moved for an approval of settlement reached in this case with the operator. The assessed penalty was for $900. The proposed settlement $600.

One violation is involved. On August 26, 1985, a M Safety and Health Administration inspector discovered tha were no self-rescuer devices stored in the No. 4 intake the designated intake escapeway for this mine. The inspe issued Citation No. 2406371, charging a violation of 30 § 75.1101-23. Section 75.1101-23 provides, in part, that operator submit a plan for emergency evacuation procedure its local MSHA District Manager. Section 75.1714-2(e) pr that this plan for emergency evacuation procedures may as area where the self-rescuer devices are to be stored. Th tion applies when the self-rescuers are to be stored more feet away from where the miners are working. In this cas assigned area was the No. 4 intake entry. The self-resc been stored, instead, in an area known as the "kitchen," the miners took their breaks and stored their personal i After the citation was issued, the self-rescuers were imm moved to the proper intake escapeway.

The violation was serious. In an emergency, the mi might have difficulty locating their self-rescuers. How Solicitor advises that in this case the miners were awar the self-rescuers were stored in the kitchen. The kitch an air-intake area and it was the designated gathering p miners in case of emergency before entering the intake e Accordingly, gravity is somewhat less than originally th and the recommended settlement remains a substantial amo

Paul Merlin
Chief Administrative Law Judge

ibution:

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April 7, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF EARL KENNEDY, LARRY COLLINS, Complainants	:	DISCRIMINATION PROCEEDI
v.	:	Docket No. VA 85-32-D
	:	MSHA Case No. NORT CD 8
	:	
	:	Mine No. 1
RAVEN RED ASH COAL CORPORATION, Respondent	:	

DECISION

Appearances: Sheila K. Cronan, Esq., Office of the Solicitor, U.S. Department of Labor, Arl Virginia, for the Complainants; Daniel R. Bieger, Esq., Copeland, Molina Bieger, Abingdon, Virginia, for the Resp

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complai by the complainants against the respondent pursuant to 105(c) of the Federal Mine Safety and Health Act of 19 complainants contend that they were discharged from th employment with the respondent because of their purpor refusal to work under unsupported roof. The respondent tains that the complainants voluntarily quit their job were not discharged for refusing to work under the all unsafe roof conditions. A hearing was held in Abingdo Virginia, and while MSHA filed a posthearing brief, th dent did not. I have considered MSHA's arguments, as the arguments made by the respondent's counsel during hearing.

The issue presented in this case is whether or not the omplainants were in fact discharged for refusing to work nder unsafe conditions. Assuming a finding of a violation section 105(c) of the Act, an additional issue is the nount of the civil penalty which should be imposed on the espondent for the violation.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, U.S.C. § 301 et seq.

2. Sections 105(c)(1), (2) and (3) and 110(a) and (d) the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(1), (2) and (3).

3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

tipulations

The parties stipulated to the following:

1. The respondent was the owner and operator of the ine in question.

2. The respondent was a corporation under laws of the tate of Virginia, and the mine was subject to the Act.

3. The complainant Larry Collins was employed by the espondent as a scoop operator from August 13 to August 23, 984, and was a "miner" as that term is used in the Act.

4. The complainant Earl Kennedy was employed by the espondent as a scoop operator from August 14 to August 23, 984, and was a "miner" as that term is used in the Act.

5. As of August 23, 1984, the daily coal production at he subject mine was 250 tons.

6. The mine is a non-union mine.

omplainants' Testimony and Evidence

Roger Lee Clevenger testified that he is employed by SHA as a mine inspector and roof control specialist working t of the Grundy field office. He testified as to his back-round, experience, and duties and confirmed that he has

mine roof-control plan and he confirmed that he assisted respondent in the formulation of the plan. He confirmed an initial plan providing for full roof bolting for a fu pillar recovery was first formulated for the mine in que in approximately April, 1983, and at that time the mine operated by the Virginia-West Virginia Mining Company. August, 1984, plan is fully applicable to the present owner-respondent, and the prior plan simply reflected ow ship by Virginia-West Virginia. He confirmed that he up the plan to reflect ownership by Raven Red Ash Coal Corp tion, and that he conducted a mine inspection in connect with the plan on August 3, 1984, at which time the mine operating with a continuous miner engaged in retreat min (Tr. 11-14).

Mr. Clevenger explained the procedures involved in retreat pillar extraction, and he stated that once the m is advanced on either 60 or 70 foot centers, the pillars extracted on the retreat cycle in an effort to remove al the coal. He identified exhibit C-2 as the applicable f pillar recovery portion of the current plan (Tr. 16). H explained the mining sequence required by the plan, and firmed that Plan A, Number 1 is the applicable plan prov relevant to this case. He also confirmed that the diffe plan provisions which may be used depend on the directio operator determines to use when approaching the pillars removal (Tr. 14-20).

Mr. Clevenger explained the roof bolting procedures sequences while cutting the pillar blocks and splits, an confirmed that for each 16 feet of coal which is removed least 15 36-inch roof bolts on 4-foot centers should be installed, not exceeding 4 feet from the rib. The roof are required to be installed in the areas marked 1, 2, 3 4 pursuant to the roof bolting patterns shown on page 12 the plan and pillary recovery plan No. 3 (Tr. 20-23). H confirmed that roof support posts are not used because o dimensions of the mining machine operating in the pillar splits (Tr. 23-23). He stated that no miners are ever p mitted to advance inby the last permanent roof supports to install temporary support (Tr. 24). He also confirme at no time are scoop operators ever permitted to work in

expose themselves to the dangers and hazards of a roof fall since they would be under unsupported roof (Tr. 25).

Mr. Clevenger stated that in the course of a regular mine inspection, an inspector will check to determine whethe or not roof bolts are installed in the pillar splits (Tr. 26 However, if the entire row of pillars have been removed, the top begins to fall and an inspector would not venture beyond the permanent supports to ascertain whether the bolts were installed. The roof would fall to the breaker posts, and an inspector could not readily observe from a safe distance whether or not the pillars had been bolted (Tr. 27).

On cross-examination, Mr. Clevenger testified that he last visited the mine on August 13, 1984, when the roof plan was changed from one mine company to the present one, and that he issued no citations. At the time of his prior visit in April, 1983, the mine was operated under the name of Virginia-West Virginia Mining Company (Tr. 28).

Mr. Clevenger stated that if pillar recovery work were taking place on August 23, 1984, the roof would be subject t fall at any time, and its likely that it would fall at any time, including the next day. However, he had no knowledge that the roof fell between August 23 and 24, and he did not know whether or not MSHA Inspector Ron Matney found any roof violations if he were at the mine on August 24 (Tr. 30-31).

Mr. Clevenger stated that in the event coal is removed from a pillar split without the installation of temporary roof support, a violation would occur. Temporary supports would include timbers or jacks, and if the coal is removed, either temporary or permanent roof support should be installed. If the coal which has been removed is more than 4 feet from the face back to the permanent roof support, the support should be installed to within 4 feet of the working face of the pillar split. If the pillar split is mined all the way through, at least 32 bolts should be installed in th pillar split to support the two cuts of coal (Tr. 34).

Mr. Clevenger stated that if additional cuts are to be taken in a pillar split after the temporary supports are installed, permanent supports must then be installed. If th cut is more than 5 feet inby the permanent support, it would be a violation not to install additional permanent support (Tr. 35). Mr. Clevenger confirmed that in pillar recovery work, planned roof falls are expected, and it is not unusual for a row of pillars to be removed one day, and for the roof

support is installed. In such a case, the only time any permitted inby the temporary support would be to install nent support (Tr. 36-37). Mr. Clevenger confirmed that no personal knowledge of the facts surrounding the compl filed in this case (Tr. 37).

Larry Collins testified that he has been a miner si 1979, and that prior to August, 1984, he worked as a sco operator at the Jewell Ridge Coal Company, but was laid in 1983. He was hired by the respondent on August 14, 1 and mine superintendent William Brewster hired him. He tially worked on the first shift, but then worked the se shift from 2:30 p.m. to 11:00 p.m. He was paid $70 a da and his supervisor was section foreman Hubert Sweeney.

Mr. Collins stated that he received no training req roof control plans. He confirmed that he was employed b respondent as a scoop operator and that the mine was enc in pillar recovery when he was employed there. Referrin exhibit C-2, a part of the roof-control plan, he explain that "Plan A" was being followed and that the pillar spl shown as 1, 3, 5 was mined all the way through without a roof bolting taking place. The miner would then mine al the numbered wing cuts as shown by numbers 6-13 without roof bolting taking place.

Mr. Collins stated that during his 2 weeks of emplo with the respondent, or a total of 8 shifts, no roof bol were ever installed on the pillar split where he was wor and he never observed the roof-bolting machine in operat He explained that the continuous-mining machine was remo controlled, and that as the scoop operator it was his jo follow the continuous miner in order to load out the coa take it to the belt for transportation out of the mine. ing this process he was required to be under unsupported and at times he would be 12 to 8 feet inby and under uns ported roof, and that this was true for the entire 2 we his employment with the respondent.

Mr. Collins stated that during his employment with respondent some rocks fell on his scoop from some roof and that he received "a few scratches." He reported th Mr. Sweeney and Mr. Sweeney stated that "it don't look bad."

that the scoop be taken out of service and repaired. Mr. Sweeney directed him to operate the scoop anyway, and that if he didn't, he would fire him. Although Mr. Collins believed that operating the scoop without lights posed a hazard to the miners because he would be unable to see them he followed Mr. Sweeney's order and continued to operate th scoop without lights.

Mr. Collins stated that on August 23, 1984, he and Mr. Earl Kennedy were working under bad top and that they were required to work beyond permanent supports where the roof had not been bolted. The roof was cracking and poppin and he told Mr. Kennedy that he was not going to take his scoop under the unsupported roof. He and Mr. Kennedy then spoke to Mr. Sweeney and informed him that they would no longer work under unsupported roof. Mr. Sweeney informed them that if they refused to continue to work they were no longer needed. At that point, Mr. Collins and Mr. Kennedy left the mine.

Mr. Collins stated that when he and Mr. Kennedy return to the mine the next day to pick up their pay, an MSHA insp tor who he did not know was at the mine office with mine superintendent William Brewster, and after discussing the matter with him, he and Mr. Kennedy decided to file a complaint the next day.

Mr. Collins stated that after he and Mr. Kennedy left the mine on August 23, 1984, the mine continued to operate until April, 1985, when it was closed. Mr. Collins confirm that after he was fired by Mr. Sweeney, he attempted to fin other employment, but could not find a job until April, 198 when he went to work with the Coon Branch Construction Comp where he is now employed and earning $80 a shift (Tr. 38-60

On cross-examination, Mr. Collins stated that he previously worked at the mine in 1983 when it was operated by Mr. Dave Jordan under the corporate name of Virginia-West Virginia Coal Company. He was employed for 3 or 4 weeks as scoop operator but voluntarily quit.

Mr. Collins confirmed that he never saw or read the respondent's roof-control plan. He also confirmed that whi operating his scoop behind the continuous-mining machine hi

was positioned ahead of the batteries, he too would be unsupported roof.

Mr. Collins stated that he was not aware of any ro falls in the mine on August 23 or August 24, 1984, and the incident concerning the lack of lights on his scoop occurred on the third day of his employment at the mine

In response to further questions, Mr. Collins stat that prior to his present employment with Coon Branch Construction, he worked for 2 weeks with the Bartlett T Trimming Company earing $4 an hour. He confirmed that received no state unemployment benefits because he had up all of his eligibility prior to his employment with respondent.

Mr. Collins reiterated that during his employment the respondent the entire coal pillars would be mined v any roof bolts being installed, and it was his view tha was a common practice. He confirmed that he never file safety complaints concerning this practice (Tr. 60-80).

Earl Kennedy testified that he was hired to work a respondent's mine by Mr. William Brewster, the mine sup tendent. He was hired on August 13, 1984, as a second scoop operator, and was paid $70 a shift. His supervis foreman Hubert Sweeney, and his last day of employment August 23, 1984.

Mr. Kennedy stated that during his employment with respondent he was engaged in pillar retrieval work spli pillar blocks of low coal. He identified exhibit C-2 a applicable roof-control plan for pillar extraction, and confirmed that "Plan A" as shown on the plan was being followed.

Mr. Kennedy stated that during his work shifts at mine he never observed any roof bolts installed while pillar splits were being mined. Although a roof-boltin machine was in the area, it was backed out of the way a never saw it used to bolt the roof.

Mr. Kennedy stated that he operated a scoop and wa required to follow the remotely controlled continuous while the pillar was being mined. He would maneuver th scoop under the miner boom in order to load out the coa the tail piece. He operated the scoop while lying on

August 23, 1984, he observed a roof bolt which had dislodged along the last row of roof bolts and a large rock approximately 30 feet long had slipped down with the bolt. He pointed out this condition to Mr. Sweeney, and he "shimmed out the roof bolt" and instructed him to continue working. Mr. Sweeney instructed him to take his scoop and pull it in beyond the bolt and up to the miner, and when he refused, Mr. Sweeney told him "to pick up my bucket and go home." Mr. Kennedy and Mr. Collins then left the mine, but returned the next day to pick up their pay.

Mr. Kennedy stated that when he and Mr. Collins returned to the mine on August 24, 1984, an MSHA inspector was at the office speaking with mine superintendent Bill Brewster. Mr. Kennedy advised the inspector that he and Mr. Collins had been fired the previous day for refusing to work under unsupported roof. When the inspector asked Mr. Brewster about the matter, he told the inspector to speak with Mr. Sweeney about the matter. After the inspector left, Mr. Brewster told Mr. Kennedy that he and Mr. Collins "had no leg to stand on because they had always worked the mine that way." Mr. Kenne returned to the mine a week later, and he discussed the matte further with Mr. Brewster and advised him that he was afraid the roof conditions. Mr. Kennedy and Mr. Collins then filed their complaints with MSHA.

Mr. Kennedy stated that after he was fired by the respon dent he was unemployed for approximately a month and a half, but then found a job with the Cumberland Coal Company earning $80 per shift. He worked for Cumberland for 5 weeks and then went to work for the Tripple G Coal Company earning $70 to $110 per shift. He was subsequently laid off and has been unemployed since September 1, 1985 (Tr. 81-94).

On cross-examination, Mr. Kennedy testified that while operating his scoop behind the continuous-mining machine he would be positioned approximately 2 to 3 feet from the machin dipper, and the pillar which was being split was approximatel 40 to 50 feet deep.

With regard to the rock which had broken loose between two roof bolts at the last row of roof bolts, Mr. Kennedy stated that the continuous-mining machine ripper head was causing the rock to vibrate.

the continuous miner can only legally proceed for a distanc of 20 feet under unsupported roof (Tr. 95-108).

William Brewster testified that he was employed by the respondent as the mine superintendent until the last week March, 1985, when the mine was "worked out" and closed. He confirmed that Mr. Dave Jordan was then the owner of the mi and that he also owned and operated several other mines.

Mr. Brewster identified exhibit C-3 as a copy of a sta ment that he made to MSHA special investigator Dewey Rife during his investigation of the complaints filed by Mr. Kennedy and Mr. Collins. Mr. Brewster confirmed that Mr. Sweeney told him that he fired Mr. Kennedy because "he did not want to pull coal" and that Mr. Collins simply qui

Mr. Brewster stated that Mr. Sweeney denied that Mr. Kennedy and Mr. Collins were ever required to work unde unsupported roof. Mr. Brewster stated further that he was the mine daily and that he never observed any pillars spli when the roof in the area had not been roof bolted (Tr. 109-112).

On cross-examination, Mr. Brewster testified that he 23 years of underground mining experience. He confirmed th Mr. Kennedy and Mr. Collins returned to the mine the day a they were fired and informed him that Mr. Sweeney had fire them because he wanted them "to run coal" and they refused Mr. Brewster stated that he offered to rehire Mr. Kennedy Mr. Collins but they refused his offer and stated that "th would find another excuse to fire them."

Mr. Brewster stated that on August 24, 1984, MSHA Ins tor Ronald Matney was at the mine and had conducted an ins tion that day. Mr. Brewster stated that he could recall n roof citations being issued that day by Mr. Matney, nor co he recall any roof falls in the mine.

Mr. Brewster stated that at all times while he was un ground on the first shift the 40 foot long pillar splits w always bolted and he has never instructed anyone to work u unsupported roof. He also stated that during the period August 14 through August 23, 1984, the roof bolter was bei used on the day first shift. He confirmed that one of his

roof.

Mr. Brewster stated that he subsequently offered Mr. Kennedy his job back a second time but that he refused. He also stated that Mr. Kennedy asked him for a lay-off slip so that he could draw unemployment, but he refused to give it to him.

In response to further questions, Mr. Brewster identified exhibits C-4 through C-8 as citations issued by Inspector Matney on August 23, 24, and 29, 1984, and he confirmed that he was with Mr. Matney during his inspections and that the citations were served on him.

Mr. Brewster stated that the continuous-mining machine is 35-1/2 feet long, and the scoop is 25 feet long. Under the circumstances, he did not believe that it was possible for the scoop operator to be under unsupported roof since the pillar splits were 40 feet long (Tr. 121-128).

In response to further questions, Mr. Brewster reviewed copies of several citations issued at the mine by Inspector Matney (exhibits C-4 through C-8) and he stated that he could not remember all of them. However, he confirmed that he knows Inspector Matney, has observed Federal mine inspectors in the mine, has received citations from them, and is familiar with the citation forms (Tr. 138-139). He identified his name on the citation forms, and he specifically recalled a citation issued on August 24, 1985, and confirmed that he was present when it was issued. The citation was issued because the wing that was left in the pillar split was too narrow and extra support posts had to be installed (Tr. 141). He also conceded that he had personal knowledge of at least some of the other citations issued by Mr. Matney, including one which was issued for 15 dislodged roof bolts in a return hallway (Tr. 142). However, he explained that it is not unusual for roof bolts to be dislodged in a hallway because of the low coal, and that a hallway is not located on an active working pillar (Tr. 146).

In response to a question as to whether it was possible for a scoop operator to be under unsupported roof, Mr. Brewster responded as follows (Tr. 147-148):

> JUDGE KOUTRAS: Mr. Brewster, I've just got a couple of questions and then we'll let you go.

machine was and you said approximately thirty two and a half feet and he asked you about the scoop and you said twenty five feet. Then he said, well under those circumstances then would it be possible for one to be under unsupported roof for a distance of thirty five feet and your answer was that's true. So I assume that -- what about for a distance of sixty feet, or fifty feet? Let's assume that under your mining plan your mining cycle that they mined for a distance of forty five, fifty, sixty feet without bolting, without roof bolting. Okay.

A. Alright.

JUDGE KOUTRAS: Of any kind. Is it possible that either the scoop operator or the continuous-mining machine operator would be under unsupported roof at any time when they go back in the mine?

A. Let's see. The miner would have to go inby the - the miner would have to go inby back to the controls is twenty foot where the deck is, okay. And from there on back to the deck is about six more foot, twenty six. Okay. And the scoop operator sits about, approximately twelve foot from the end of the scoop. So that gives you twenty six, thirty six, he'd have to go thirty eight foot before he would be inby the roof supports.

JUDGE KOUTRAS: Okay.

A. The miner would have to go at least thirty eight foot deep.

JUDGE KOUTRAS. So if it mined a sixty foot distance, with absolutely no roof bolts, then he would be under unsupported roof wouldn't he?

A. Right.

And at (Tr. 158):

BY MR. BIEGER:

said well, yes, but how big were the the blocks were only forty to forty five feet, right?

A. Approximately, yeah.

Q. So when you're pulling pillars and the pillar is forty to forty five feet, you don't have a situation where they are mining sixty feet, is that right?

A. Right.

Mr. Brewster stated that normally the continuous miner would not go beyond the end of the pillar being extracted because the roof could fall on the miner. He denied that he was under any pressure to produce coal, and confirmed that in pillar extraction on his section the maximum distance that is mined would be 40 feet (Tr. 160).

Mr. Brewster confirmed that he worked the day shift and would not be in the mine during the afternoon or night shift when the complainants were working. He stated that he would not be underground with the complainants, and he would not be aware of any instances where the pillars were not bolted. He confirmed that his testimony concerning the bolting of pillars would only apply to his day shift, and that he had no knowledge about the night shift. When asked whether it was possible that the night shift was mining pillar splits without roof bolting, he replied "It's possible" (Tr. 150).

Mr. Brewster stated that when the complainants returned to the mine the day after their termination, he discussed the matter with them and offered them their jobs back, and the inspector was present when this occurred (Tr. 151). He specifically recalled the complainants telling him (Brewster) that Mr. Sweeney expected or directed them to work under unsupported roof and when they refused to do so he told them to "pick up their buckets and go on down the road," or words to that effect (Tr. 151). Mr. Brewster stated that his reaction to these statements by the complainants was that Mr. Sweeney could not lay them off for refusing to work under unsupported roof (Tr. 152). Mr. Brewster stated further that he discussed the matter with Mr. Sweeney, and his testimony

A. Yes.

JUDGE KOUTRAS: Well, what did he tell you about it?

A. Well, he told me that they was sitting down at the mouth of the break talking and the best I can remember, he told me he hollered at them and I believe the Kennedy boy come on up there and he got on to him and he told him if he wasn't going to pull coal to go on to the house. And they went on.

JUDGE KOUTRAS: Well, what's that mean. I mean, there's a lot -- I don't understand why Mr. Sweeney would just tell them -- what were they doing? Goofing off or not working or what?

A. That's the way I understood it, just a goofing off.

JUDGE KOUTRAS: And, Mr. Sweeney told them if they weren't going to pull coal, just to go on home and you -- why would you offer them their jobs back then? After they told you their side of the story?

A. Well, if Hubert wronged them, I mean that's the right thing to do.

JUDGE KOUTRAS: Which one -- well, if Mr. Sweeney tells you that he told them to go home because they were goofing off and didn't want to work, and the two men told you that that's not true, that Mr. Sweeney expected them to work under unsupported roof, and that's why he told them to go home, who would you tend to believe? Or, how would you resolve that obvious conflict?

A. Rephrase that again.

JUDGE KOUTRAS: So, without even talking to Mr. Sweeney, you told the two men to come back to work.

A. I said if that's the way it was, come on back out to work. When they come to work, I would have had to have talked it over with Hubert, you know.

JUDGE KOUTRAS: Okay. And by that time you had talked it over with Mr. Sweeney?

A. No. I didn't even know nothing about it until they come and told me.

JUDGE KOUTRAS: After the two men left, did you then talk to Mr. Sweeney?

A. Right.

JUDGE KOUTRAS: And Mr. Sweeney told you that they just didn't want to work or what?

A. That's what he told me. He said they was down there at the mouth of the breaker talking and he hollered at them and one of them, I believe Kennedy, come on up there and he told him if they wasn't going to pull coal, to go on to the house. Now, that's what he told me happened.

JUDGE KOUTRAS: Okay. Did you ask Mr. Sweeney about what Mr. Kennedy and Mr. Collins had told you? That he expected them to work under unsupported roof?

A. No, he didn't tell me anything like that.

JUDGE KOUTRAS: Did you mention it. Did you ask Mr. Sweeney whether there was any truth in what these two men told you?

said it wasn't true.

Mr. Brewster stated that neither the complainants or their crew ever complained to him about any lack of roof bo ing or unsafe conditions, and he was not aware of any rock ever falling on Mr. Collins' machine. He confirmed that Mr. Sweeney never complained about the complainant's work, and that he (Brewster) hired Mr. Kennedy because he had the reputation of being a good scoop man (Tr. 156).

Hubert Sweeney, testified that he was employed by the respondent as an underground section foreman on the second shift and that he was laid off on March 15, 1985, when the mine "worked out" and was closed. Prior to this time he worked at the mine in 1982 when it was operated as the Virginia-West Virginia Coal Mine, and it was owned by Mr. Jordan, the respondent's owner.

Mr. Sweeney confirmed that Mr. Kennedy and Mr. Collins worked for him as scoop operators on the second shift. He denied that he directed them to work under unsupported roo or that he fired them for refusing to do so. He stated tha during the shift on August 23, 1984, he observed Mr. Kenne and Mr. Collins sitting in their equipment talking and he told them that if they did not want to "pull coal" to go he He stated that he fired them for "goofing off."

Mr. Sweeney confirmed that he was interviewed by MSHA special investigator Dewey Rife on September 20, 1984, dur his investigation of the complaints and he admitted tellin Mr. Rife that Mr. Collins and Mr. Kennedy quit their jobs that he did not know what happened to cause them to quit (160-165).

Mr. Sweeney testified as follows with respect to the circumstances under which the complainants left their jobs (Tr. 166-170):

> JUDGE KOUTRAS: Why did these two men quit, Mr. Sweeney?
>
> A. Sir, I don't know why they quit. They were down at the break a talking. They didn't want to pull no coal and I told them if they couldn't do no better than that they might as well go home. One got to preaching that I fired him and the other one, he didn't -- I

they doing, talking? What are you talking about. Were they taking their break or what?

A. I couldn't hear them. Yes, they was sitting on the scoop. You have to crawl on your knees and hands and I hollered down to where I could hear them and they was -- seen them a sitting down there in the break a talking.

JUDGE KOUTRAS: Just chit-chatting?

A. Just chit-chatting, right.

JUDGE KOUTRAS: And you told them what now?

A. If they couldn't do no better than that they might as well get their buckets and go on home.

JUDGE KOUTRAS: What did they tell you?

A. They didn't tell me nothing. They just got in the scoop. I crawled right back towards the face and I asked the other scoop man where he was at and said why, they've done gone home. And when I come outside they had done went home. Or otherwise they was still outside a waiting on a ride but they quit.

JUDGE KOUTRAS: That was the last you saw of them?

A. Yeah, that's the last I saw after they crawled on the outside.

JUDGE KOUTRAS: Did you tell anybody that the two men had quit?

A. Sir?

JUDGE KOUTRAS: Did you tell anybody at the mine that these two men had quit?

A. Yes, I told the others.

operator.

JUDGE KOUTRAS: Did you tell the mine superintendent, Mr. Brewster?

A. Yes, the next day.

JUDGE KOUTRAS: What did you tell him the next day?

A. I told him they quit and I said I don't know why. They was no reason, they gave me no reason.

JUDGE KOUTRAS: Did you tell Mr. Brewster you fired them?

A. Yes, sir. I told him that I told them if they couldn't do no better than what they was doing, laying on the scoop, to get their bucket and go.

JUDGE KOUTRAS: Well, did you fire them or did they quit?

A. Well, I guess you'd call it firing them. They just took off going on outside. I guess you'd call it firing them.

JUDGE KOUTRAS: Have you ever had any miners in your experience leave a job under similar circumstances?

A. No, sir, I haven't.

JUDGE KOUTRAS: Isn't that a little unusual?

A. Unless they'd be sick or something.

JUDGE KOUTRAS: I mean it's a little unusual for two men to just up and quit because the supervisor told them to get on with working, to stop talking?

JUDGE KOUTRAS: Does it seem kind of unusual to you for them to just get up and take off?

A. It seemed to me like they don't want to work. They tried to get me to get them a cut-off slip the night before that. I got the impression they don't want to work.

JUDGE KOUTRAS: What's a cut-off slip?

A. That's a slip where you could draw unemployment.

JUDGE KOUTRAS: The night before?

A. The night before, sir.

JUDGE KOUTRAS: Well, tell me about that? How did they expect you to give them a slip the night before?

A. They just wanted me to lay them off.

JUDGE KOUTRAS: Well, now if you laid them off or fired them, were they eligible for unemployment?

A. I don't know, sir.

JUDGE KOUTRAS: You mean the night before these two men come up to you and asked you for an unemployment slip? They got tired of working and they wanted to draw unemployment?

A. Yes, sir. They wanted to draw unemployment. Didn't want to work.

JUDGE KOUTRAS: The story I'm hearing is these two men didn't want to work under unsupported roof and you kind of suggested that if they didn't want to work under unsupported roof pulling coal, they might as well go on home?

under roof supports.

JUDGE KOUTRAS: Did you ever suggest or say anything to them that would lead them to believe that?

A. No, sir. While you're in the mine, I ain't going to put nobody's life in danger. I've never had no problem with men all my life except these two. I don't know why. I treated them right. Didn't cuss them out or nothing.

JUDGE KOUTRAS: Had you known these two men before they came to work?

A. No, sir. The first time.

JUDGE KOUTRAS: And they had worked for you how long? A couple of days or what?

A. Yeah, a couple of days, or maybe three.

Mr. Sweeney denied that roof bolting was never done on his section, and he stated that he always followed the roof-control plan. He explained the bolting process and denied that his crew ever cut all the way through a pillar c worked under unsupported roof while cutting coal (Tr. 172). He conceded that he was not always present while the continu ous miner was operating, and that when he was present he wou always position himself next to the continuous miner (Tr. 17

Terry Kennedy testified that he is Earl Kennedy's broth and that he has been employed with the Island Creek Coal Company for 7 years. He stated that while he was laid off from that job he worked for the respondent as a scoop operat and timber man on the second shift for 2 days on August 13 a 14, 1984, and that Hubert Sweeney was the shift foreman.

Mr. Kennedy stated that during the 2 days he worked on the second shift the coal pillars were split down the middle straight through and that the continuous miner would then pull out and mine the right and left wings. During this tir he never saw any roof bolts installed on the mined pillar splits and the roof-bolting machine was never used. Althou he was never required to work under unsupported roof while pulling the pillars he did so anyway in order "to keep his job." He stated that Mr. Sweeney knew he was working under unsupported roof.

Mr. Kennedy stated that he discussed the roof conditions with Mr. Sweeney and informed him that he was jeopardizing the safety of the miners by not roof bolting the pillars. He stated that Mr. Sweeney informed him that since the mine was a "small truck mine" they could "get by with just about anything" (Tr. 174-182).

Jerry Kennedy testified that he is currently unemployed and has 11 years of mining experience. He stated that he is not related to the complainant and that he was employed by the respondent from August 13, 1984 to August 23, 1984, as a second shift scoop operator and timber man, and he confirmed that shift foreman Hubert Sweeney was his supervisor.

Mr. Kennedy stated that during his employment with the respondent he was engaged in pillar work and he indicated that after the pillar was "timbered up" the continuous-mining machine would go in and cut the pillar split until it was mined through to the end. As the timber man he would be in and out of the pillar while it being mined and at no time did he ever observe roof bolts being installed in the pillar. Although a roof bolter was on the section, he never observed it being used to pin the roof.

Mr. Kennedy stated that during his shift on August 23, 1984, he overheard Mr. Sweeney tell Mr. Earl Kennedy that "if you can't do that I don't need you after this shift." He heard Mr. Kennedy reply "if you don't need me than you don't need me now." Mr. Kennedy stated that he had no idea what Mr. Sweeney and Earl Kennedy were discussing. He stated that he observed scoop operators working under unsupported roof and that this was a common occurrence on the second shift during his employment at the mine (Tr. 184-188).

On cross-examination, Mr. Kennedy stated that he first met Mr. Earl Kennedy and Mr. Collins when he went to work for the respondent. He confirmed that he quit his job on August 23, 1984, because he didn't like the pay and the height of the coal. He stated that he never complained about the roof conditions or the lack of roof bolting. He also confirmed that Hubert Sweeney was married to his cousin (Tr. 188-198).

Bobby Mullins testified that he is employed by the Rocking-R Coal Company and that he has 12 years of underground mining experience. He confirmed that he was employed by the respondent for 3 weeks during August, 1984. He worked on the first shift as a miner and pinner helper. He stated that

ground every day during the day shift.

Mr. Mullins stated that he worked at the faces pulling pillars, and that during his employment at the mine he never saw the roof bolter used to install roof bolts on the pillars (Tr. 199-202).

On cross-examination, Mr. Mullins confirmed that he grew up with Earl Kennedy. He stated that he quit his job with the respondent after Mr. Brewster threatened to fire him. He explained that he and several other miners were pulling a miner cable with a scoop and it separated. Since he was the "cable man," Mr. Brewster held him responsible for the cable separating and when he informed him that he would be fired, he quit before Mr. Brewster could fire him (Tr. 202-206).

Respondent's Testimony

David B. Jordan, testified that he was the President and part-owner of the Raven Red Ash Coal Corporation and he confirmed that the mine was closed down in March of 1985. He stated that he usually goes underground in his mines every 2 or 3 months. He stated that he has personally never fired any of his employees and that he has never directed anyone to fire any employee.

Mr. Jordan confirmed that he was at the mine in question on August 24, 1984, delivering the payroll and he learned at that time that Mr. Sweeney had fired Mr. Kennedy and Mr. Collins for "refusing to pull coal." Mr. Jordan stated that MSHA Inspector Ronald Matney was at the mine on August 24, 1984, and that he discussed the matter with him. Mr. Matney had conducted an inspection that day and except for some loose roof bolts on the haulage road Mr. Matney assured him that "everything looked fine" underground.

Mr. Jordan stated that no one had ever complained to him about unsafe working conditions underground. He confirmed that he has not paid any of the civil penalty assessments reflected in MSHA's computer print-out, exhibit C-9, because he could not afford it. He also confirmed that he was in the process of working out a "settlement" with the Department of Justice to pay those penalties (Tr. 219-224, 226).

Mr. Jordan stated that the No. 1 Mine where the complainants were employed is mined out and that it closed in March, 1985. He confirmed that he just opened a new mine, and when asked about the financial condition of his company, he

by MSHA to compensate one of the complainants, and that agreed, the case would be dropped. He stated that had lieved the complainants were fired for working under e conditions, he would have not contested the complaints 229).

Mr. Jordan confirmed that since he was not underground day to day, he would not know how Mr. Sweeney operated ection, and while he believed that it was possible that omplainants were terminated for reasons which they have fied to in this case, he would have no knowledge of this ay or the other (Tr. 231). He stated that he chose to ve Mr. Sweeney, Mr. Brewster, and Inspector Matney (Tr. He disclaimed any knowledge as to the complainants' es in claiming that they were fired for refusing to work unsupported roof (Tr. 235).

Mr. Clevenger was recalled as the court's witness, and ated that assuming the two complainant's were engaged in g an entire 40-foot block of coal continuously while in scoops, they could be 4 to 6 feet past permanent roof rts. If the entire coal block is mined without pulling nd bolting after cutting 20 feet, a violation of the control plan would result because the plan stipulates the maximum depth of the coal being mined should not d 20 feet without bolting. In addition, the remote con- for the miner may not advance beyond permanent roof rt (Tr. 251-252).

Mr. Clevenger stated that he has been in the mine several and has never received any complaints with respect to ining procedures (Tr. 253). In response to questions respondent's counsel, Mr. Clevenger stated as follows 254-255):

Q. Do you remember before when I asked you when you're pulling timbers, if you pull one is it likely that they have a roof fall the very next day and you said it's quite possible that the could have a roof fall at anytime?

A. Yes, sir. I said that.

Q. Well, doesn't that seem -- doesn't it surprise you that not only -- that if you can go

A. It'd be according to the type of strata that you've got.

Q. Yeah, I know it would be, but if it's quite possible that it would fall the next day --

A. I don't know that this has been done.

Q. Well, I'm just asking you a hypothetical question.

A. Right, you're asking a theory.

Q. Isn't it unusual, if as you say, that the roof could fall the very next day, isn't it unusual that you would mine all of these pillars right and left for two weeks and never put the first bolt in and never have a roof fall? Isn't that pretty incredible?

A. If it's being done, yes.

Q. Okay.

A. There's no set time when a pillar fall would come because you have to put additional support, timbers, until you get enough weight to override these timbers --

Q. Right. I understand that.

A. -- it's pretty well hold itself.

Mr. Clevenger explained the roof bolting pattern and sequence for the mine, and he indicated that if no roof bol were installed in certain areas during the period from August 13 to 23, it was possible that Inspector Matney did not see the areas because of the roof falls and he would no venture inby the breaker posts (Tr. 257-259). In the event one cut of coal was taken when Mr. Matney was in the mine, temporary supports would have been installed, but no boltin was required until that cut was completed and a second one begun. If Mr. Matney was there the entire day, he would ha

ment of the parties, his deposition was taken on November 14, 1985, and it has been filed and made a part of the record in this case.

Mr. Matney stated that he has been employed by MSHA as a coal mine inspector since October 1, 1978. He testified as to his background, training, and experience, and confirmed that he is familiar with the respondent's mine. He stated that Mr. David Jordan was the president and owner of the Raven Red Ash Coal Company, and that the mine at one time operated under the corporate name of Virginia-West Virginia Coal Corporation. He confirmed that Mr. Jordan was the president and owner of both corporations, and that during his inspections at the mine when they were under both corporate names he observed Mr. Jordan there. He also observed Mr. Bill Brewster and Mr. Hubert Sweeney at the mine when it operated under the name of Virginia-West Virginia Coal Corporation (Tr. 3-6).

Mr. Matney stated that he inspected the respondent's No. 1 Mine four times a year, and that depending on the conditions of the mine, the inspection takes from 3 to 5 days to complete. He confirmed that he began an inspection of the mine on August 24, 1984, and that he was accompanied by Mr. Brewster. Mr. Matney stated that he arrived at the working face area of the mine at approximately 9:20 a.m., and day shift personnel were at work. Work had started approximately 2 hours earlier, and after checking the face area he proceeded to the area where employees were working removing coal. He observed that a split or pillar block of coal approximately 20 feet had been removed and the crew had moved back to the next line of crosscuts to begin a new phase of mining across the working faces. He confirmed that he issued a violation on the cut of coal that had been taken because the respondent was not complying with its roof-control plan for pillar extraction The plan required that a 10-foot block of coal be left on each side of the pillar split as a means of roof support, and he found that instead of leaving a 10-foot wing for support, the wing of coal which was left was between 4 and 8 feet. Under the circumstances, Mr. Matney issued a section 104(a) "signifi cant and substantial" citation charging the respondent with a violation of mandatory section 75.200, for failure to comply with the roof-control plan. Mr. Matney stated that the respon dent did not contest the citation (Tr. 7-12).

at the pillar areas which had been mined on previous
and from his position at the pillar breaker line he
his light back into the area in an attempt to observ
had been done. He did not venture beyond the pillar
line because of the "danger of the conditions of the
However, from his vantage point at the breaker line
not see anything because the roof had collapsed "up
the breaker line," and he could not determine whethe
previous shift had installed roof bolts in the pilla
The coal had been mined out and the "roof was collap
solid" up to the breaker line (Tr. 13).

Mr. Matney stated that after completing his und
inspection on August 24, he returned to the surface
imately 12:00 to 1:00 p.m., in the company of Mr. Br
and they proceeded to the mine office. While standi
office doorway, Mr. Collins and Mr. Kennedy came by
Mr. Matney asked them "how they were doing." Mr. Ke
responded "not so good," and when asked why by Mr. M
Mr. Kennedy informed him that Mr. Sweeney had fired
previous evening "for not hauling coal out from unsu
roof that was broke." Mr. Matney stated that he comm
Mr. Brewster that he could not fire anyone "for unsaf
practices," and that there was a possibility that Mr
and Mr. Collins could file discrimination charges aga
respondent. Mr. Matney also stated that he informed
Mr. Kennedy and Mr. Collins that he had inspected the
and found "no violations that they had done" (Tr. 14-

Mr. Matney stated that when he mentioned the fac
Mr. Kennedy and Mr. Collins could file a discriminati
charge, Mr. Brewster attempted to contact Mr. Sweeney
ground and stated to Mr. Kennedy and Mr. Collins "if
you say it is, you'll get your jobs back." At that p
time, Mr. Matney left the mine office to return to hi
office, and he did not know whether Mr. Brewster cont
Mr. Sweeney. Mr. Kennedy and Mr. Collins were still
office when Mr. Matney left. Mr. Matney stated that
Mr. Jordan was not at the mine that day, and that at
has he had any conversations with Mr. Jordan about th
incident (Tr. 16).

On cross-examination, Mr. Matney stated that the
no doubt in his mind that he did not speak with Mr. J
August 24 while at the mine. He stated that accordin
legal identity files maintained in his MSHA office, M
was the president of both the Virginia-West Virginia
Company and the Raven Red Ash Coal Company, and that

August 24. One cut of coal approximately 20-feet wide by 20-feet deep had been taken out of the pillar and jacks had been set and a roof bolter was present and was about to begin the roof bolting cycle. He issued the citation because additional roof supports were required to be installed due to the subnormal roof conditions which resulted from not leaving enough coal for roof support. He drew a diagram of the block of coal being mined, and he explained how the pillar was cut and split and bolted and timbered (deposition exhibit-A; Tr. 22-26).

Mr. Matney stated that the respondent had no advance knowledge that he would inspect the mine on August 24, and that it is illegal for anyone to advise an operator of a scheduled inspection. He stated that at the time he observed the pillar which had been cut, no roof bolting had actually taken place, but the safety jacks had been set and the roof bolting machine was in place ready to bolt the roof (Tr. 27).

Mr. Matney stated that the last previous inspection of the mine was probably conducted 2 months prior to August 24, but he could not recall whether pillar work had been done at that time. Although he issued a citation for dislodged roof bolts during his August inspection, he could not recall issuing any citations during his previous inspection (Tr. 29). The dislodged bolts in question were in a crosscut hallway, and he explained that they are usually dislodged because the miner is too big for the low coal being mined (Tr. 30).

Mr. Matney stated that he did not discuss the respondent's pillar extraction procedures with Mr. Brewster, and he confirmed that because of the roof falls he could not determine whether roof bolting had been done during prior shifts. He stated that such falls are normal in pillar retrieval mining and that the roof is supposed to fall (Tr. 32). Mr. Matney reiterated that he heard Mr. Brewster state that if Mr. Sweet fired Mr. Collins and Mr. Kennedy because of their refusal to work under unsupported roof, they would get their jobs back (Tr. 33).

Mr. Matney stated that a wing of coal could be mined in 25 minutes, and that it would take approximately 2 to 3 hours to mine a pillar. Two working shifts could probably extract five pillars of coal. He explained that the roof is falling

behind the areas where the coal has been extracted. Timb
are a means of temporary support for the roof, and after
coal is extracted roof bolts and timbers will not support
weight of the roof, and any resulting roof falls are "con
trolled falls" (Tr. 37). He believed it was possible or
able to pull a number of pillars over a period of time wi
installing roof bolts, but he would not recommend it (Tr.

Findings and Conclusions

In order to establish a prima facie case of discrimi
under section 105(c) of the Mine Act, a complaining miner
the burden of production and proof to establish (1) that
engaged in protected activity and (2) that the adverse ac
complained of was motivated in any part by that activity.
Secretary on behalf of Pasula v. Consolidation Coal Compa
2 FMSHRC 2768, (1980), rev'd on other grounds sub. nom.
Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d
1981); and Secretary on behalf of Robinette v. United Cas
Coal Company, 3 FMSHRC 803 (1981). Secretary on behalf o
Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (19
The operator may rebut the prima facie case by showing ei
that no protected activity occurred or that the adverse a
was in no way motivated by protected activity. If an ope
cannot rebut the prima facie case in this manner it may r
theless affirmatively defend by proving that (1) it was a
motivated by the miner's unprotected activities alone. T
operator bears the burden of proof with regard to the aff
tive defense. Haro v. Magma Copper Company, 4 FMSHRC 193
(1982). The ultimate burden of persuasion does not shift
from the Complainant. Robinette, supra. See also Boich
FMSHRC, 719 F.2d 194 (6th Cir. 1983); and Donovan v. Staf
Construction Company, No. 83-1566, D.C. Cir. (April 20, 1
(specifically-approving the Commission's Pasula-Robinette
test). See also NLRB v. Transportation Management Corpor
_____ U.S. _____, 76 L.Ed.2d 667 (1983).

The issue in this case is whether or not the complai
were discharged by the respondent because of their reluct
or refusal to perform work as scoop operators under unsup
ported roof. MSHA's position is that the complainants we
fired for refusing to work under unsafe roof conditions (
248 and posthearing brief). Although the respondent did
file any posthearing arguments, I assume from the argumen
made by counsel on the record during the course of the he
in this case that its position is that the complainants e
quit their jobs voluntarily or they were discharged by se
shift foreman Hubert Sweeney because of their "refusal

The respondent produced no mine records documenting the separation of the two complainants. Mr. Jordan testified that Mr. Brewster told him that the two had quit, and that Inspector Matney told him that they were fired by Mr. Sweeney "for refusing to pull coal" (Tr. 220-221). Mr. Jordan was also of the opinion that the two men quit (Tr. 229).

During his direct testimony, Mr. Brewster testified that Mr. Sweeney told him that he fired Mr. Kennedy because "he did not want to pull coal," and that Mr. Collins simply quit. On cross-examination, Mr. Brewster stated that Mr. Sweeney told him that he told Mr. Collins and Mr. Kennedy to "go on to the house," and that he (Brewster) was led to believe that Mr. Kennedy and Mr. Collins did not want to pull coal and that Mr. Sweeney told them to go home because they were "goofing off."

Mr. Sweeney's testimony as to whether he fired Mr. Collin and Mr. Kennedy, or whether they quit is inconsistent. Mr. Sweeney first testified that he fired the two for "goofing off" after he observed them sitting in their equipment talking He then testified that he told at least one other man on the shift that the two had quit and that he told Mr. Brewster that they had quit and that he had fired them. When specifically asked whether he had fired them or whether they quit, Mr. Sweeney responded "Well, I guess you'd call it firing them They just took off going on outside. I guess you'd call it firing them" (Tr. 168).

Mr. Sweeney admitted that when he was interviewed by an MSHA inspector on September 20, 1984, during the investigation of the discrimination complaints, he told the inspector that Mr. Collins and Mr. Kennedy quit their jobs, and that he (Sweeney) had no knowledge as to why they quit. Mr. Sweeney's prior denials of any knowledge as to why the two complainants left their jobs raises a question in my mind as to his credibility. If Mr. Sweeney had just cause to discharge the complainants, it seems to me that he would have told the investigating inspector his side of the story as to why the two men left their jobs rather than denying any knowledge of the incident.

Both Mr. Kennedy and Mr. Collins were consistent in their assertions that they had been fired by Mr. Sweeney. The statements to this effect, made to Inspector Matney and Mr. Brewste the day following their termination, are consistent, and both

their testimony. Mr. Sweeney is likewise consistent.

After careful consideration of all of the testimony this case, I conclude and find that on August 23, 1984, Mr. Collins and Mr. Kennedy were fired from their jobs a scoop operators by Mr. Hubert Sweeney, respondent's seco shift foreman, and that their termination was not the re of voluntary quits on their part.

Mr. Brewster confirmed that he had never received a complaints about the complainants' work performance. He firmed that he initially hired Mr. Kennedy because of hi reputation as a good scoop man, and that Mr. Collins was because he had worked at the mine in a previous occasion Mr. Brewster believed that he could operate a scoop (Tr. Mr. Sweeney testified that the complainants had only wor for him for 2 or 3 days before they were terminated, and was under the impression that they did not want to work 169). Other than this opinion by Mr. Sweeney, there is evidence that the complainants were other than good empl nor is there any evidence that they had ever complained mine management or to any MSHA inspectors about any haza job conditions or safety infractions.

During the course of the hearing, mine operator Jo suggested that since Inspector Matney had just been unde ground and assured him that "everything looked fine," th assertions by the complainants that they were asked or required to work under unsupported roof is incorrect. ever, I take note of the fact that Mr. Sweeney did not management that he terminated the complainants until the day. Significantly, after Mr. Jordan and Mr. Brewster made aware of the terminations, and after Inspector Mat advised Mr. Brewster of the possible ramifications of t terminations, including a possible discrimination compl by the complainants, Mr. Jordan and Mr. Brewster did no underground to ascertain the facts or to determine or a to determine whether the area where the two individuals working was in fact roof bolted. Mr. Brewster and Mr. apparently opted to believe Mr. Sweeney's explanation t fired the complainants because they did not want to wor find it rather strange that mine management, once alert a Federal inspector on the scene of the possible ramifi of the discharge, would not immediately ascertain all o facts so as to protect itself from any possible discrim claims.

shift could have been mining and splitting pillars without roof bolting (Tr. 150). However, since he was not underground during the night shift, he would have no way of personally knowing that this was the case, and he stated that no one on the night shift, including Mr. Collins or Mr. Kennedy, ever complained to him about the lack of roof bolting or hazardous conditions (Tr. 154-155).

Mr. Jordan testified that he may have been underground once every 3 or 4 months in response to calls from the superintendent concerning adverse mining conditions (Tr. 219). He confirmed that due to his absence from the underground mine on a day-to-day basis, he would have no way of knowing how Mr. Sweeney operated the section. While it was possible that Mr. Collins and Mr. Kennedy are correct in their assertions that pillars were pulled without roof support, Mr. Jordan stated that he had no personal knowledge that this was the case (Tr. 230-231).

Mr. Brewster asserted that during the period from August 14 to 23, 1984, the roof bolter was used on the first day shift. He also asserted that his two sons worked on that shift as a scoop operator and mechanic's helper, and that he would not jeopardize their safety by requiring them to work under unsupported roof. While these assertions may be true, the fact is that Mr. Collins and Mr. Kennedy worked the evening shift under Mr. Sweeney's supervision, and Mr. Brewster had no knowledge as to how Mr. Sweeney worked his shift. Under the circumstances, I find Mr. Brewster's assertions as to what may have transpired during his day shift to be irrelevant to the question concerning what Mr. Sweeney expected his shift to do, or whether or not the claims by Mr. Collins or Mr. Kennedy that they were expected to work under unsupported roof are supportable by credible evidence.

Mr. Jordan claimed that he spoke with Mr. Matney after discussing the matter with Mr. Brewster, and that Mr. Brewster informed him that the two men were going to file a complaint. Mr. Jordan also stated that Mr. Brewster advised him that Mr. Sweeney had fired Mr. Collins and Mr. Kennedy for "refusing to pull coal." Given these circumstances, I find it rather peculiar that Mr. Jordan did not go underground to ascertain precisely what had happened. If all of the principals were readily available a day after the discharge, it occurs to me that the natural thing for Mr. Jordan to have

had been mined on the second shift the day before [illegible]
ascertain all of the facts. Further, since Mr. Collins
Mr. Kennedy were readily available at the mine on August
also find it rather peculiar that Mr. Jordan did not spe
with them to ascertain their side of the events leading
their termination. I also find it rather strange that n
Mr. Jordan or Mr. Brewster spoke with any other members
Mr. Sweeney's shift to ascertain all of the facts. None
these individuals were called to testify on behalf of th
respondent.

Mr. Jordan explained that he made no further inquir
because he assumed that Inspector Matney's comments that
inspection on August 24 detected nothing wrong with the
tions underground led him to believe that everything "ha
be right" (Tr. 263). Mr. Matney denied speaking to Mr.
when he encountered Mr. Collins and Mr. Kennedy at the m
office the day following the discharge. During their te
mony, Mr. Brewster, Mr. Collins, and Mr. Kennedy did not
tion that Mr. Jordan was present at the mine office on
August 14, when Inspector Matney encountered the two men
Mr. Brewster stated that he spoke with Mr. Sweeney after
Mr. Collins and Mr. Kennedy left (Tr. 153). Mr. Matney
fied that there was no doubt in his mind that he did not
to Mr. Jordan on August 24, 1984.

Mr. Jordan stated that he could ascertain from the
map and work shift records the mine areas which had beer
during the period August 3 to 24, 1984. I assume that t
records would reflect the mine conditions in those areas
that they would also possibly reflect whether or not cer
areas had been bolted as the mining sequence took place.
ever, the respondent produced no records in this regard,
did it call any witnesses for testimony in this case. A
the witnesses were either subpoenaed or called by MSHA,
Mr. Jordan, who was present at the hearing, was called a
court's witness. Although Mr. Sweeney mentioned that tw
miners were present on the shift when he fired Mr. Colli
Mr. Kennedy, they were not called as witnesses, and the
dent produced no testimony or evidence from any other m
who may have also worked on the evening shift when Mr. C
and Mr. Kennedy were fired.

In view of the foregoing, I have given little cons
tion to Mr. Jordan's defense that Inspector Matney assu
him that everything was in order underground on the mor
after the terminations. While it is true that Mr. Matn

underground on the morning after the terminations of Mr. Collins and Mr. Kennedy, he testified that he could not tell whether any roof bolting had been done because pillar work had begun in a new area and he could not safely observe what had been done on prior shifts because the roof had fallen in up to the pillar break line.

I have also given little weight to the testimony by Mr. Jordan and Mr. Brewster with regard to the roof bolting practices or other conditions which may have existed on the second shift during the periods when the complainants were working on that shift. For the reasons stated earlier, I conclude and find that Mr. Brewster and Mr. Jordan had little or no presence underground during the second working shift and were in no position to personally observe any of the prevailing working or mine conditions during that shift.

Complainant Larry Collins testified that during his employment on the second shift, entire coal pillars were mined without any roof bolts ever being installed, and that this was a common practice. Complainant Earl Kennedy testified that during his employment on the second shift a roof bolter was present on the section but it was backed up out of the way and he never observed it being used to install roof bolts while the pillar splits were being mined.

Terry Kennedy, Earl's brother, testified that for the 2 days he worked on the second shift on August 13 and 14, 1984, no roof bolts were ever installed and the roof bolting mahine was never used. Terry Kennedy testified further that while no one ever directed him to work under unsupported roof, he did so anyway "to keep his job." He also asserted that he told Mr. Sweeney that the safety of the miners was being jeopardized by not roof bolting, and that Mr. Sweeney replied that since the mine was a small operation they "could get by with just about anything."

Jerry Kennedy, who is unrelated to the complainant, testified that during his employment on the second shift from August 13 to 23, 1984, he never observed the roof bolter in use or the roof being bolted. He testified that the pillars would be mined through to the end without any pillar roof bolting taking place, and that he observed scoop operators go under unsupported roof, and that this was a "common occurrence."

Bobby Mullins, who work the day shift as a pinner helper, testified that during his employment underground for 3 weeks

The only testimony which directly contradicts
mony of the complainants and the two corroborating
who worked the same shift as the complainants with
whether or not roof bolting was ever done during t
pillar extraction process on the second shift is t
second shift foreman Hubert Sweeney. Mr. Sweeney
that the roof was always bolted in accordance with
plan.

Mr. Sweeney confirmed that during MSHA's inve
of the complainants, he told MSHA special investig
Rife that Mr. Collins and Mr. Kennedy quit their j
that he (Sweeney) did not know why they had quit.
hearing, Mr. Sweeney testified that he did not kno
complainants had quit and later admitted that he f
for "goofing off" or not wanting to work. I find
testimony to be inconsistent, and his failure to f
to the special investigator all of the relevant fa
ing the terminations leads me to conclude that his
this case is less than credible. Further, Mr. Swe
second shift foreman and the safety of his crew wa
sibility. In these circumstances, I believe it is
to conclude that any testimony by Mr. Sweeney must
light of a natural interest on his part not to put
position of being held personally accountable for
results which may flow from exposing miners to haz
conditions or practices, or from any claims of dis
discharges.

After careful consideration of all of the tes
regarding the asserted absence of any roof bolting
second shift during the complainants employment wi
respondent, I find the testimony of the complainan
corroborating witnesses to be credible and it supp
clusion that roof bolting was not being accomplish
second shift during all times relevant to the comp

During their employment at the mine on the se
the complainants were working in low coal and were
retreat coal pillar extraction. Such pillar extra
itself potentially more hazardous than normal mini
it includes self-induced roof falls behind the are
which the coal has been removed, and the full natu
support of the coal pillar which at one time serve
the roof has been removed or lessened because of t
of the coal.

Mr. Kennedy testified that while operating his scoop he would be lying on his back, and Mr. Sweeney stated that after speaking with Mr. Collins and Mr. Kennedy underground about their "chit-chatting," he had to "crawl" out of the area on his hands and knees. Mr. Brewster testified that because of the low coal it was not unusual for roof bolts to become dislodged. Under all of these circumstances, I believe it is reasonable to conclude that the low coal heights posed an additional potential hazard to the complainants who were expected to work in these areas. Coupled with my finding that roof bolting was not being done during the pillar extraction process on the second shift, I conclude that during their employment on the second shift, the complainants were exposed to a serious hazard of a potential unplanned roof fall with resulting serious injuries.

Since I have concluded that the pillar splits were not roof bolted on the second shift during the complainants' employment on that shift, I also conclude and find that as scoop operators, Mr. Kennedy and Mr. Collins were necessarily required to work under unsupported roof and that section foreman Sweeney expected them to. In addition to the testimony of Mr. Collins and Mr. Kennedy that they were under unsupported roof when they operated their scoops, Mr. Brewster confirmed that assuming the pillars were not bolted, the scoop operators would be operating under unsupported roof. During his explanation of the respondent's roof-control plan and the procedures for pillar extraction, Inspector Clevenger stated that the cutting of a pillar for a distance of 20 feet without pulling out and bolting would violate the respondent's roof-control plan, and if the scoop operators worked the entire 40-foot pillar continuously with no bolting taking place, they would be 4 to 6 feet past permanent roof supports. Scoop operator Jerry Kennedy (not related to Earl), testified that it was a common occurrence for scoop operators to work under unsupported roof on the second shift.

It is well settled that the refusal by a miner to perform work is protected under section 105(c)(1) of the Act if it results from a good faith belief that the work involves safety hazards, and if the belief is a reasonable one. Secretary of Labor/Pasula v. Consolidation Coal Company, 2 FMSHRC 2786, 2 BNA MSHC 1001 (1980), rev'd on other grounds, sub nom Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3rd Cir 1981); Secretary of Labor/Robinette v. United Castle Coal Company, 3 FMSHRC 803, 2 BNA MSHC 1213 (1981); Bradley v. Belv Coal Company, 4 FMSHRC 982 (1982). Secretary of Labor v. Metric Constructors, Inc., 6 FMSHRC 226 (Feb. 1984), aff'd sub

(11th Cir. 1985). Further, the reason for the refusal t
must be communicated to the mine operator. Secretary of
Labor/Dunmire and Estle v. Northern Coal Company, 4 FMSH
(1982).

I find the testimony of the complainants that they
informed shift foreman Sweeney on August 23, 1984, that
would not continue to work under unsupported roof to be
ble. Mr. Collins testified that at the time of the refu
the roof was cracking and popping. Mr. Kennedy stated t
prior to his work refusal, he observed a dislodged roof
and a large rock approximately 30 feet long which had sl
down with the bolt. After Mr. Sweeney "shimmed out the
bolt," he instructed Mr. Kennedy to continue working his
beyond the slipped rock and up to the miner, but Mr. Ken
refused. Mr. Collins testified that after discussing th
ation further, he informed Mr. Kennedy that he would no
work under unsupported roof, and that he and Mr. Kennedy
informed Mr. Sweeney.

Mr. Sweeney confirmed that he observed Mr. Kennedy
Mr. Collins sitting in their scoops at the pillar break
ing on a discussion. He then confronted them, and after
discussion, the two men left the mine. Mr. Sweeney subs
quently first testified that he informed Mr. Brewster th
two had quit for no reason. He then testified that he i
Mr. Brewster that he had fired them for "goofing off."
Mr. Brewster's subsequent offers to Mr. Kennedy and Mr.
to come back to work raises a strong inference in my min
Mr. Brewster had some doubts about their termination, an
their contention that they were fired for refusing to wo
under unsupported roof has a ring of truth about it.

As discussed earlier, at the time of the discharges
conditions which existed while the complainants were eng
pillar extraction work presented a serious hazard of a p
tial unplanned roof fall. Further, Mr. Collins testifie
he previously experienced rock falling on his scoop, tha
was required to operate the scoop with malfunctioning li
and that the roof was cracking and popping. Mr. Kennedy
fied that a large rock had slipped out of the roof at th
where the roof had been bolted at the pillar break, and
Kennedy testified that he had previously informed Mr. Sw
that the lack of roof bolting on the pillars was jeopard
the safety of the miners. Given all of these circumstan

work under unsupported roof on August 23, 1984, was justified. I further conclude and find that the complainants had a good faith, reasonable belief that continuing to work inby permanen roof support was hazardous.

The record in this case establishes that the complainants were satisfactory employees and had never been disciplined about their work. As a matter of fact Mr. Brewster confirmed that he hired them because of their reputation as good scoop operators. Further, there is no evidence that the complainant ever filed any safety complaints with MSHA or with mine management, or that they were considered troublemakers or malingerers.

The testimony and statements of Mr. Sweeney and Mr. Brewster concerning the termination of the complainants is inconsistent, and I have given it little weight. As indicated earlier, Mr. Sweeney's testimony that the two men quit, and his later statement that he fired them casts doubts as to his credibility. Likewise, Mr. Brewster's prior statements to the MSHA investigator, and his testimony at the hearing, indicates an inconsistency as to his understanding of whether the complainants were fired for cause or voluntarily quit their jobs. Contrasted with this testimony, is the consistent statements of the complainants, both during the hearing, and in their prior contacts with the MSHA investigator, Inspector Matney, and mine management, that they were fired by Mr. Sweeney because they refused to work under unsupported roof.

I conclude and find that the preponderance of the evidence and testimony adduced in this proceeding establishes that Mr. Kennedy and Mr. Collins were fired by shift foreman Sweeney because of their refusal to continue to work as scoop operators under unsupported roof. I further conclude and find that the work refusal by the two complainants was protected activity under the Act, and that their discharge by the respondent for this reason constitutes a violation of section 105(c)(1) of the Act.

The Relief Due the Complainants

Mr. Kennedy testified that after his discharge by the respondent on August 23, 1984, he was unemployed for approximately a month and a half. He then found a job with the Cumberland Coal Company earning $80 a shift, and worked there for 5 weeks. He then went to work for the Tripple G Coal Company earning $70 to $110, but was subsequently laid off

He worked continuously for Cumberland and Tripple C, until his lay off from the latter company, and then worked for approximately a month and a half at the Rookie Coal Company until his lay-off on September 1, 1985 (Tr. 94).

Mr. Collins testified that after his discharge by the respondent on August 23, 1984, he attempted to find other employment but could not find a job until April, 1985. He confirmed that he received no unemployment benefits because he had used up all of his eligibility for such benefits. He stated that he found a job in April, 1985, with the Coon Branch Construction Company where he is presently employed earning $80 per shift. Prior to this current employment, he worked for 2 weeks with the Bartlett Tree Trimming Company earning $4 an hour, but was laid off (Tr. 68-69).

The respondent opted not to file any posthearing arguments or to otherwise file any arguments mitigating its liability in these proceedings. In its posthearing brief, MSHA asserts that the remedial goal of section 105(c) is "to restore the [victim of illegal discrimination] to the situation he would have occupied but for the discrimination." Bailey v. Arkansas-Carbon Co. & Walker, 3 MSHC 1145, 1150 (1983); Secretary on behalf of Dunmire and Estle v. Northern Coal Co., 2 MSHC 1585, 1595 (1982). MSHA states that unless compelling reasons point to the contrary, the full measure of relief should be granted to an improperly discharged employee, including back pay with interest. Bailey v. Arkansas-Carbona Co. & Walker, at 1150-1151. Since in this case the complainants were fired for engaging in protected activity, MSHA asserts that they must be made whole for any loss they suffered as a result of the discrimination, including full back pay. MSHA points out that the respondent bears the burden of proof with regard to any allegation of willful loss of pay. Secretary v. Metric Constructors, Inc., 3 MSHC 1259, 1265 (1984), aff'd sub nom. Brock on behalf of Parker v. Metric Constructors, Inc., 3 MSHC 1865 (11th Cir. 1985).

MSHA points out that at the time Mr. Brewster offered the complainants their jobs back, they rejected the offer because they believed Mr. Sweeney would again require them to work under unsupported roof. Mr. Collins testified that when Mr. Brewster offered to take them back, he stated "We'll forget this ever happened." When Mr. Collins questioned whether they would again be required to work under unsupported roof,

and when Mr. Collins asked for another work assignment, Mr. Brewster refused.

Mr. Kennedy testified that he and Mr. Collins advised Mr. Brewster that they would take their jobs back as long as they were not required to work under unsupported roof. He stated that Mr. Brewster replied "that's the way we always work," and that if they did not return to work they did not have a "leg to stand on" (Tr. 91).

I take note of the fact that at the time Mr. Brewster made the offer to the complainants to return to work, he did so in the presence of an MSHA inspector and after an inquiry by the inspector as to whether the complainants had in fact been fired for refusing to work under unsupported roof. Mr. Brewster testified that when he made the offer, the complainants refused and commented that the company would find another excuse to fire them. Mr. Brewster also testified that when he made the offer, it was contingent on his speaking with Mr. Sweeney to ascertain why he had fired the complainants. He subsequently was told by Mr. Sweeney that the complainants were fired for "goofing off," and he obviously believed Mr. Sweeney's version of the incident.

In view of the foregoing, I agree with MSHA's arguments that the reluctance of the complainants to accept Mr. Brewster's conditional offer to return to work, in the circumstances then presented, did not constitute a willful loss of pay on their part. I also agree with MSHA that the respondent has not established a willful loss or pay which would entitle it to mitigate its liability or obligation to make the complainants whole.

Mine operator Jordan testified that the No. 1 Mine was completely mined out and closed in March, 1985 (Tr. 227-228). He confirmed that his company reopened a new mine on October 15, 1985, but he was not aware that any employees who worked at the old No. 1 Mine are now employed at his new operation (Tr. 237). The hiring of new employees is left to the mine superintendent Leeland Hess, and he identified the mine foremen as Jim Cook and Gerald Hess (Tr. 237).

Mr. Sweeney testified that he is unemployed, and that he left his employment with the respondent on March 15, 1985 (Tr. 161). Mr. Brewster testified that he is currently employed by the Vesta Mining Company, and that he left the respondent's employ during the last week of March, 1985, because the No. 1 Mine "was mining out" (Tr. 110-112).

The back pay provisions of section 105(c), like the corresponding provisions of Title VII of the Civil Rights Act, appear to be modeled on section 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c). Cf. Albemarle Paper Co. v. Moody, 422 U.S. 405, 419 (1985). Questions arising under it should therefore be resolved by reference to NLRB precedent. Id. The general rule is that back pay is the difference between what the employee would have earned but for the wrongful discharge and his actual interim earnings. OCAW v. NLRB, 547 F.2d 598 (D.C. Cir. 1976). In practice, this means gross pay minus net interim earning equals the award. Respondent, of course, is responsible for complying with applicable state and Federal laws on withholding. Cf. Social Security Board v. Nierotko, 327 U.S. 358 (1946).

MSHA asserts that since the respondent did not present any evidence that the complainants would have been discharged prior to the closing of the mine for non-discriminatory reasons, it has not met its burden of proof, and that back pay should be awarded to the complainants at the rate of $70 per day for the period from August 23, 1984 until the March 31, 1985. Taking into account the testimony of Mr. Collins and Mr. Kennedy with respect to their periods or unemployment and employment subsequent to their discharge, MSHA states that Mr. Kennedy is entitled to back-pay compensation in the amount of $2,170, with interest, which includes pay for Friday, August 24, 1984, and $350 per week for the next 6 weeks. With regard to the compensation for Mr. Collins, MSHA states that he is entitled to back-pay in the amount of $10,600, with interest, which includes pay for Friday, August 24, 1984, and $350 per week for the next 31 weeks with a deduction of $320 for his earnings with the tree trimming company. MSHA states that interest for both complainants should be determined in accordance with the Commission approved formula set out in Secretary, ex rel Bailey v. Arkansas-Carbona Co. & Walker, 3 MSHC 1145 (1983); 5 FMSHRC 2042, 2050.

ORDER

The respondent IS ORDERED to pay to the complainant Earl Kennedy the sum of $2,170, less any amounts normally withheld

llins the sum of $10,600, less any amounts normally withheld rsuant to state and Federal law, with interest to the net ck-pay award at a rate of 9 percent until it is paid.1/

Payment is to be made to both complainants within thirty 0) days of the date of this decision and order.

Civil Penalty Assessment

On the basis of my prior findings and conclusions, the spondent's discharge of the complainants was in violation section 105(c)(1), and a civil penalty assessment may be vied against the respondent for the violations.

MSHA argues that the violation was very serious, and it quests a civil penalty assessment in the range of $1,000 to ,200. I agree that the violations were serious. The respon- nt's discharge of the complainants for refusing to work der unsupported roof constitutes a negligent disregard for eir safety, and the respondent has advanced no arguments in tigation of the violations.

The record reflects that the respondent is a small mine erator, and the No. 1 Mine is now closed. However, mine erator Jordan is still in business and operates other mines. e respondent has not established that the payment of a civil nalty in the amounts suggested by MSHA will adversely affect s ability to continue in business, and I conclude that it ll not.

This is the current adjusted prime rate used by the ternal Revenue Service for underpayments and overpayments tax. Rev. Ruling 79-366. The NLRB also uses this figure compute interest on back pay awards. Florida Steel Corp., l N.L.R.B. No. 117, 1977-78 CCH NLRB Para. 18,484; North mbria Fuel Co., Inc., v. N.L.R.B., 645 F.2d 177 (3rd Cir. 81); Secretary ex rel Bailey v. Arkansas Carbona Coal & lker, 5 FMSHRC 2042, 2050 (Dec. 1983).

MSHA has submitted exhibits C-9 and C-10, two co
print-outs listing the assessed violation history for
Raven Red Ash Coal Corporation No. 1 Mine for the per
August 23, 1982, to August 22, 1984 (C-9), and the vi
history for all mines controlled by Mr. David Jordan
period August 23, 1982, to August 22, 1984, (C-10).
C-9 reflects 42 section 104(a) citations and one sect
104(a)-107(a) order for which the respondent was asse
$3,130, and has paid nothing. Exhibit C-10 reflects
tion 104(a) citations and three orders for which the
dent was assessed $7,069, and has paid $1,255.

During the course of the hearing, the respondent
to any consideration of violations issued prior to Aug
1984, on the ground that the mine was owned by a diffe
corporation, the Virginia and West Virginia Coal Corpo
and that Mr. Jordan was not the owner of that company.
submitted information to the contrary by letter and en
of January 9, 1986, and the respondent filed nothing i
response to that information and has not rebutted MSHA
tion that Mr. Jordan was the owner and controller of b
porations. In an order issued by me on February 13, 1
respondent's objections were overruled, and I conclude
the compliance history of the Raven Red Ash Coal Corpo
as well as the prior corporate entity for the No. 1 Mi
of which were owned and operated by Mr. Jordan, are re
to any civil penalty assessment levied in this proceed
interlocutory ruling in this regard is herein REAFFIRM
respondent has had ample opportunity to challenge the a
of the information contained in the computer print-outs
it has not done so.

I take note of the fact that while the respondent
been assessed civil penalties for its prior infractions
the mandatory safety standards promulgated by MSHA unde
Act in Part 75, Title 30, Code of Federal Regulations,
made few payments. According to the computer codes ref
on the print-outs, most of the assessments have been th
ject of MSHA demand letters for payment, and many have
up as default judgments filed in the United States dist
court. Although Mr. Jordan is still in business and op
ing other mines, he has apparently failed to meet his ob
tions in paying civil penalties, and I have considered
in the civil penalty assessed for the violation in quest
I have also considered the fact that the respondent has
previously been the subject of discrimination complaints
violations of section 105(c)(1) of the Act.

ivil penalty criteria found in section 110(i) of the Act, I onclude and find that a civil penalty assessment of $1,000 s reasonable and appropriate for the violations which are he subject of these proceedings.

ORDER

The respondent IS ORDERED to pay a civil penalty in the mount of $1,000 for the violations in question, and payment s to be made to MSHA within thirty (30) days of the date of his decision and order.

George A. Koutras
Administrative Law Judge

istribution:

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JIM WALTER RESOURCES, INC., Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. SE 85-36 Order No. 2482922;
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	No. 4 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCE
	:	Docket No. SE 85-62 A.C. No. 01-01247-0
v.	:	Docket No. SE 85-12 A.C. No. 01-01247-0
	:	No. 4 Mine
JIM WALTER RESOURCES, INC., Respondent	:	Docket No. SE 85-10 A.C. No. 01-01401-0
	:	Docket No. SE 85-12 A.C. No. 01-01401-0
	:	No. 7 Mine

DECISIONS

Appearances: Robert Stanley Morrow and Harold D. I Esqs., Jim Walter Resources, Inc., Bi Alabama, for Contestant/Respondent; George D. Palmer, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for Respondent/Petitioner.

Before: Judge Koutras

110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for four alleged violations of certain mandatory safety standards found in Part 75, Title 30, Code of Federal Regulations. Docket No. SE 85-36-R is a contest filed by Jim Walter Resources, Inc., challenging the legality of section 104(d)(2) Order No. 2482922, which is the subject of civil penalty Docket No. SE 85-62.

The respondent filed timely answers contesting the proposed civil penalties and hearings were held in Birmingham, Alabama. The parties waived the filing of posthearing proposed findings and conclusions. However, all oral arguments made by counsel on the record during the course of the hearings have been considered by me in the adjudication of these cases.

Issues

The critical issue presented in these proceedings is whether or not the respondent is obliged to maintain its ventilation line curtains within 10 feet of all faces, or only the working faces from which coal is being extracted or was most recently extracted.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violations

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

3. 30 C.F.R. § 75.316.

4. Commission Rules, 29 C.F.R. § 2700.1 et seq.

The parties stipulated to the following:

1. The respondent is the owner and operator of the subject mine.

2. The respondent and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The Administrative Law Judge has jurisdiction in these cases.

4. The MSHA Inspectors who issued the subject orders or citations were authorized representatives of the Secretary.

5. A true and correct copy of the subject orders or citations were properly served upon the respondent.

6. Copies of the subject orders or citations and determinations of violations at issue are authentic and may be admitted into evidence for purpose of establishing their issuance, but not for the purpose of establishing the truthfulness or relevance of any statements asserted therein.

7. The imposition of civil penalties in these cases will not affect the respondent's ability to continue in business.

8. The alleged violations were abated in good faith.

9. The respondent's history of prior violations is average.

10. The respondent is a medium-size mine operator.

The violations in issue in these proceedings are as follows:

andatory safety standard 30 C.F.R. § 75.316. The condition
r practice is described as follows:

> The companies (sic) approved ventilation plan was not being complied with in that the curtain line in No. 2 entry on the No. 13 section measured 24 feet from the face. They had turned a crosscut from the No. 2 entry toward the No. 1 entry on the curtain line side leaving the No. 2 entry 24 feet from the deepest penetration. The companies (sic) approved ventilation plan states that the line brattice shall be maintained within 10 feet of the area of deepest penetration of all faces in all working places inby the last open crosscut at all times, except while roof bolting and servicing as stated in the plan.

ocket No. SE 85-109

Section 104(d)(2) "S&S" Order No. 2481092, was issued at
:02 a.m., on April 8, 1985, and it cites a violation of
andatory safety standard 30 C.F.R. § 75.316. The cited con-
tion or practice is described as follows:

> The current approved ventilation methane and dust control plan was not being complied with on the No. 11 section (011-0) in that the line curtain was 19 feet from the point of deepest penetration of the face of the No. 2 entry. The plan requires line curtain be maintained within 10 feet of all working places inby the last open crosscut at all times.

ocket No. SE 85-124

Section 104(a) "S&S" Citation No. 2347351, was issued at
:20 p.m., on April 13, 1985, and it cites a violation of
andatory safety standard 30 C.F.R. § 75.503. The condition
r practice is described as follows:

> The Joy model 12, S/N 3524 and approval No. 2G-33344A-00 being operated in the faces of the No. 6 active section to cut and load coal from these faces was not being maintained

in permissible condition in that an opening in excess of .004 inches was observed in the lid of the control box.

Section 104(d)(2) "S&S" Order No. 2482911, was 6:00 a.m., April 13, 1985, and it cites a violation tory safety standard 30 C.F.R. § 75.316. The condit practice is described as follows:

> The current approved ventilation and methane and dust control plan was not being complied with in the No. 3 entry on the No. 6 section. The line brattice was measured to be 34 feet from the face of the No. 3 entry. The plan states that line brattice shall be maintained to within 10 feet of the area of deepest penetration of all faces in all working places inby the last open crosscut at all times except while roof bolting. Roof bolting was not being performed in the entry and a distance greater than 10 feet has not been granted by the MSHA District Manager.

Docket No. SE 85-123

Section 104(d)(2) "S&S" Order No. 2346556, was 9:40 a.m., on April 15, 1985, and it cites a violati mandatory safety standard 30 C.F.R. § 75.316. The c dition or practice is described as follows: "The ap ventilation methane and dust-control plan was not be plied with in the No. 5 entry crosscut right in that brattice was 17 feet from the face. The approved pl requires that line brattice be maintained to within of all working places."

The parties stipulated that the issue concernir alleged violations of mandatory safety standard 30 C § 75.316, and the contestant/respondent's approved v tion and methane and dust-control plan are identical issue presented in the case of MSHA v. Jim Walter Re Inc., Docket No. SE 85-42, decided by Judge Broderic September 27, 1985, 7 FMSHRC 1471. The parties agre the issue presented is that stated by Judge Broderic 7 FMSHRC 1474, as follows: "Whether respondent is c maintain line curtain within 10 feet of all faces, c the face from which coal is being extracted or was

sue in Docket No. SE 85-109, is dispositive of all of
ject cases. The parties also agreed and stipulated
e alleged violations are accurately described and eval-
n the appropriate sections of the respective orders and
e preconditions of the respective orders (unwarrantable
, no "clean" inspection, etc.) are met if the "face"
etermination is made in favor of MSHA's position.

the prior decision by Judge Broderick, he concluded
e respondent was in violation of its approved ventila-
an by failing to maintain line curtain within 10 feet
face in the No. 3 entry on the No. 4 section in the
ine. His dispositive ruling (conclusion of law) is
as follows at 7 FMSHRC 1474-1475:

> 3. The approved ventilation, methane and
> st control plan in effect at the subject
> ne on November 13, 1984 required that line
> rtains be maintained within 10 feet of all
> ces in all working places. A "coal face" is
> fined in A Dictionary of Mining, Mineral and
> lated Terms, U.S. Department of the Interior
> 968) as
>
> a. The mining face from which
> coal is extracted by longwall,
> room, or narrow stall system.
> Nelson. b. A working place in a
> colliery where coal is hewn, won,
> got, gotten from the exposed face
> of a seam by face workers.
> Pryor, 3.

is definition obviously is not limited to
e time during which coal is actually being
tracted. It includes working faces as well
faces from which coal has been or will be
tracted. The language of the approved plan
all inclusive and clearly includes entry
. 3 cited in this case. The obvious purpose
the changes made in 1972 was to go beyond
e requirement of 30 C.F.R § 75.302-1(a) that
ne brattice be installed no more than 10 feet
om active working faces. All faces, includ-
g idle faces, are covered by the plan. The
ason for their inclusions is the unusually

dent argues that the requirement is onerous and that it has not been enforced by MSHA prior to 1984. Neither of these arguments can affect the interpretation of the wording of the plan, and I reject them.

MSHA's Testimony and Evidence

With regard to Order No. 2482922, issued in civil Docket No. SE 85-62 and contest Docket No. SE 85-36-R, No. 2482911 issued in civil penalty Docket No. SE 85-1 Order No. 2346556, issued in SE 85-123, the parties ag that MSHA need not present testimony from the inspecto issued those orders since their testimony would be the the inspector who issued Order No. 2481092 in civil pe Docket No. SE 85-109. The parties agreed that all of orders present common issues of the application and en ment of mandatory standard section 75.316, and the resp dent's ventilation plan (Tr. 90-92; 256-258).

MSHA Inspector Judy McCormick confirmed that she inspected the No. 7 Mine on April 8, 1985, and issued C No. 2481092, (Docket No. SE 85-109). She identified ex G-3 as a sketch of the underground scene and confirmed it accurately portrays the condition she cited. She st that coal was being mined at the point shown by an "X" sketch and that the violation occurred at point "Y" whe face had been penetrated. The line curtain depicted by dotted line was located 19 feet outby that "Y" face, an since the ventilation plan required that the curtain be tained to within 10 feet of all faces, she issued the violation (Tr. 96).

Ms. McCormick stated that the hazard presented in having the curtain to within 10 feet of a face is the po bility of methane accumulations at the "Y" face, and she the direction of the air ventilating the entry by the ar shown on the sketch (Tr. 98). She confirmed that the ve tion plan, exhibit G-1, at page 10, requires that a mini of 17,000 cubic feet of air reach the end of the line br where coal is being cut. Since coal was not being cut a "Y" face, only 7,000 cubic feet of air was required at t location (Tr. 98-99).

On cross-examination, Ms. McCormick stated that she a methane test and found less than one percent of methan the "Y" face, and she confirmed that her interpretation the plan was made to prevent a potential

e sketch was idle at the time of her inspection, and
the most recently mined area was at the point marked "X".
stimated that the respondent had turned away from the
marked "Y" and began mining toward the point marked "X"
al days earlier than the day of her inspection (Tr.
02).

Ms. McCormick defined a "working face" as an area from
coal is extracted on the mining cycle. She stated that
aw does not provide a legal definition of the term
," and she would "guess" that it means an area from which
is to be extracted or is being extracted (Tr. 102). She
d that since the area shown as "Y" had been penetrated,
ould consider it a "face" requiring line brattice to
n 10 feet. Had the area not been penetrated, and
ugh respondent defines it as a "rib," she would still
retically" consider it to be a "face" because coal will
e future be extracted from that location. She confirmed
anywhere that coal is planned to be extracted would be a
" subject to the ventilation plan requirement for line
ice (Tr. 104-106).

Ms. McCormick confirmed that she made no smoke tube test
e "Y" face area to determine the amount of ventilation
r circulation in that area (Tr. 110). She explained
the violation was issued for failure to maintain the
brattice to within the required distance of that face,
ot for a failure to maintain proper air velocity (Tr.
13).

Ms. McCormick stated that the areas marked "X" and "Y"
e sketch are both working places. She indicated that
rea marked "X" is penetrated for approximately 50 feet,
hat area "Y" is penetrated for some 8 feet. In both
nces, "X" and "Y" would both be the deepest penetration
ng faces of working places (Tr. 117).

Ms. McCormick stated that while "X" and "Y" are both
ng places, mining could not take place simultaneously at
locations because two miners would be operating on one
of air, and that is not permissible. She considers
"X" and "Y" to be "working places," but not "working
," and since the ventilation plan addresses "faces of
ng places," she considers both locations to be "faces of
ng places" (Tr. 120).

McCormick confirmed that at the time of the inspection, a brattice curtain was within the required 10 feet of the "X" working face where coal had last been cut (Tr. 121). Although she could test for air movement at location "Y," and the total air intake into the No. 2 entry, she would have no way of determining the amount of air flowing into area "Y" (Tr. 122). She confirmed that abatement was achieved by advancing the curtain at an angle as shown on the sketch, (Tr. 126), and she conceded that this presented a possible hazard because there would be a visibility problem between the mining machine and shuttle car, and to some extent the respondent would be forced to operate through the curtain. However, she explained that this problem was created by turning the crosscut as depicted on the sketch, and that had it been turned from the side to the left of the "Y" area the problem would not exist (Tr. 124).

William H. Meadows, MSHA supervisory mining engineer, testified that he is a graduate professional mining engineer, and that he has engaged in the review and approval of mine ventilation plans since 1969. He stated that the ventilation plan changes concerning the respondent's No. 4 and No. 7 Mines occurred in 1972 after a frictional methane ignition occurred in the No. 3 Mine. The ignition occurred when a continuous-mining machine was scraping the bottom after a line curtain was taken down after the working face was mined. A citation was issued for a violation of section 75.316, but after a determination was made that coal was not being mined and that the line brattice was within 10 feet of the working face, the violation was voided and the case was dismissed. He confirmed that he was called upon to furnish his expert opinion in that case, and on the basis of the facts of that case, he concurred in the decision that a violation could not be supported.

Mr. Meadows stated that as a result of the prior litigation, the language of the ventilation plan for the No. 3 Mine was changed, and the words "working faces" were changed to reflect a requirement that "all faces" would in the future be required to have line curtains installed to within 10 feet. The requirement that line curtains "be maintained to within 10 feet of the area of deepest penetration of all faces in all working places inby the last open crosscut except while roof bolting and servicing as stated in the plan" was also included in all subsequent plans approved by MSHA for the No. 4 and No. 7 Mines.

Mr. Meadows confirmed that the term "faces" is not defined by MSHA's regulations. In his opinion, one has to assume from the history and

tices to within 10 feet of the face implies that they be so maintained at all mine faces, including idle faces.

Mr. Meadows pointed out that the respondent's old ventilation plan simply paraphrased the requirements of section 75.302-1(a), which required that line brattices be maintained to within 10 feet of the area of deepest penetration of the working face. The purpose in adding the new language was to distinguish between "working faces" as it existed in the law and plan at that time and "all faces in all working places" (Tr. 140).

Mr. Meadows also pointed out that section 75.308 makes reference to methane accumulations in face areas of working places, and line brattices are not specifically mentioned. While there are regulatory definitions for the terms "working places" and "working faces," there is no definition of a face. However, he believes that one must assume a definition from past experience, enforcement, and research. "Faces" would result after one has "worked a face." Once a "working face" has been cut, mined, and loaded, the dropping of the word "working" means "it's no longer being worked, it now becomes a face" (Tr. 141).

Mr. Meadows referred to a February 1969 Bureau of Mines pamphlet, Exhibit ALJ-1, and pointed out that the term "working face" is not used. He described the ventilation tests covered by the publication, and he indicated that when a continuous miner penetrates a coalbed, it extracts coal from a working face. When the miner ceases operation, that working face becomes a face, and if he were to conduct a study similar to the one covered in the publication, he would refer to the "working face" simply as a "face" similar to the reference made in the publication (Tr. 142-143).

Mr. Meadows stated that the respondent's mines freely liberate methane at all faces, including idle faces, and that the mines are among the top 10 percent of all mines nationally with respect to methane liberation (Tr. 144-145).

Referring to the sketch of the No. 2 entry of the No. 7 Mine, exhibit G-3, Mr. Meadows stated that he would consider the areas marked "X" and "Y" as faces. If coal were being cut at "X" and not at "Y," he would consider the former a working face, and the latter an idle face. He explained that the reason the language "all faces" was included in the MSHA approval letters accompanying the respondent's ventilation

working face. If no coal cuts are made, the area is
rib until such time as a coal cut is taken. He furt
explained that if he observed coal being cut, he wou
sider it a working face, and if work stopped after t
tial cut, he would consider it simply as a face (Tr.
When asked whether such a cut would remain a working
between shifts when no production is taking place, h
"To me, a working face is only when you cut it, mine
load it, or the district manager specifies some othe
tion such as roof bolting, blasting, clean-up" (Tr.

Mr. Meadows confirmed that the respondent's ven
plan is one of the most stringent plans in the count
agreed that while theoretically possible, due to the
in which the crosscuts in question were turned, the
dent would have difficulty in maintaining a line cur
within 10 feet of "Y" while cutting coal at face "X"
154-155).

Mr. Meadows stated that the terms "working face
"face" have different meanings to him, but he conced
during his testimony in a prior case before Judge Br
with respect to the term "face" he testified that "O
tion was that the line curtain would be maintained t
faces. You can pick the word 'working faces' or 'fa
all faces" (Tr. 159). He conceded that he did not d
tiate the terms in his prior testimony, but pointed
the word "working" brings a new meaning to the term
because of the use of that term in the regulation.
ther conceded that the regulation does not use the t
"faces" by itself (Tr. 160).

Mr. Meadows conceded that the requirement for l
tice to be maintained to within 10 feet of all faces
specifically stated in the respondent's plan in clea
guage, and he alluded to the plan provisions at page
through 13 where the term face is used, and indicate
face, if you want to call it a working face or a fac
They're one in the same" (Tr. 165-167).

Mr. Meadows confirmed that were it not for the
vision in this case, an inspector could not cite a v
of section 75.302-1, at locations "X" and "Y" becaus
was no mining activity taking place at those locati

they would not be considered "working faces" at the time of the inspection. If mining was taking place, then an inspector could cite section 75.302-1, but at location "Y" no citation could be issued unless the district manager had designated it as another "working face" used for bolting, servicing, or it was designated as an idle face. Rather than doing this, the district manager elected to drop the word "working" from the plan, and used the phrase "all faces" (Tr. 178).

Mr. Meadows stated that the area "Y" was mined and developed in the No. 2 entry, and while it was being mined it was a "working face." When mining ceased, it became a "face" which was required under the plan to have line brattice to within 10 feet. There is no plan provision to remove that brattice from the "Y" area. Had "Y" not been cut for a distance of 8 feet it would still technically be considered a "face" because it was developed as the face of the No. 2 entry. In the event the respondent does not consider it a face, he suggested that it file a supplemental ventilation plan requesting approval not to maintain the line curtain at that location (Tr. 180).

Mr. Meadows stated that a face in any mine in any place where future mining is planned is a potential face, but that he would not require a brattice at the area to the right of the sketch off entry No. 2 which has not actually been mined or cut unless it had actually been developed as a face up to that point (Tr. 182). He conceded that his prior testimony in the earlier litigation indicated that even if the respondent intended to turn right, he would still consider it a "face" (Tr. 183).

With regard to the method of abatement in the instant case, Mr. Meadows confirmed that a potential hazard is created by installing the line curtain to within 10 feet of the "Y" area as was done in this case. The hazards concern a possible short circuiting of the air and a visibility problem in that equipment will run through the curtain. Some mines use clear curtains so that miners can see through it (Tr. 184). However, he believed that such problems would not occur if the respondent had cut through from the "non-curtain side," or if the crosscuts had been mined from left to right (Tr. 185). In the instant case, the violation was issued because the inspector found that the line curtain was not maintained to within 10 feet of "Y," which was the point of deepest penetration in the No. 2 entry (Tr. 189).

the No. 7 Mine. He is familiar with the violation issu
Inspector McCormick, and in his opinion, because of the
ment operating in the area, it would be impossible to m
a line curtain to within 10 feet of face "Y" without ta
down. He stated that the respondent's No. 7 Mine ranks
two nationwide in incidents of methane ignition, and th
No. 3 Mine ranks number one (Tr. 191-196).

On cross-examination, Mr. Dewberry stated that he
believed the 8-foot cut into the "Y" face was a mistake
that the spads were simply overcut. Normally, the rib
come straight across at that point. He also believed t
would have been more practical to turn right off the No
entry and cut from the off-curtain side because the ven
tion curtain could then be maintained to within 10 feet
the face in all penetration areas (Tr. 202-204).

Respondent's Testimony and Evidence

Thomas E. McNider testified that he is the respond
deputy manager for ventilation, and he confirmed that h
duties include the development of mine ventilation plan
stated that the applicable mine ventilation plans for t
respondent's No. 3 and No. 7 Mines all make reference t
ing faces where actual work is being performed. He bel
that the mine faces referred to in the plans must neces
be interpreted as working faces, and that the use of th
guage all faces as referred to in MSHA's covering lette
approving the plans must be construed to mean working f
in order to be consistent with the actual plans submitt
the respondent.

Referring to the sketch of the No. 2 entry in ques
exhibit G-3, Mr. McNider was of the opinion that the ar
marked "X" on the sketch is a working face, but that th
cited area marked "Y" is a rib. He also believed that
area to the right of the developed crosscut as shown on
sketch, even though a potential crosscut, is in fact a
He believes there is but one working face in a working

Mr. McNider stated that advancing the ventilation
tice to within 10 feet of the purported face designated
on the sketch to achieve abatement in this case constit
hazard in that the brattice curtain would short circuit
air moving along that location. The brattice would als
down on the visibility and would subject the brattice t
being torn down by equipment moving through the area (T
216).

. McNider stated that as faces are advanced, there are
rking places and four working faces. Working faces
ned to establish new crosscuts. As a crosscut is
shed to the left and then advances to the right, at
int in time the right "rib" becomes a face and the
sly mined "face" becomes a rib (Tr. 216). Holing
the crosscut as was done in this case is proper
the "X" area becomes the working face and the line
would be maintained to within 10 feet of that face,
point of deepest penetration, and machines would not
ing through the curtain (Tr. 218).

cross-examination, Mr. McNider confirmed that the
ent's No. 3 and No. 7 Mines were opened in the 1970's.
eved that the crux of the issue presented in these
ings turns on the definition of the term "face." It
position that the positioning of the ventilation brat-
vices as referred to in the mine ventilation plans
working faces where coal is actually being cut and
and that MSHA's position is that the requirements
all faces, including those which are idle and not
ctively or currently mined.

. McNider stated that any methane present at point "Y"
sketch would be under 1 percent, and if any is detected
d be cleared up. He also indicated that the majority
methane at the respondent's mines is generated while
actually mined at the cutting face, and that any meth-
erated at the ribs is of a lesser degree and magnitude.
pointed out that the majority of methane ignitions
the working face when a continuous miner is scraping
and he could think of none which have occurred at an
ce. Although an ignition could ocur at an idle face,
rk activity has to be taking place, and if this were
e, the face would no longer be an idle face (Tr. 227).

. Meadows was called in rebuttal, and he stated that
s a potential for methane build-up at an idle face
nd that potential ignition hazards are presented when
performed in the area, or equipment and cables are
. He confirmed that a ventilation survey he supervised
ed that there were 15 methane ignitions in the No. 7
fiscal year 1985. Assuming that the mine did not lib-
ethane freely, he was of the view that the term "all
would probably not be part of the mine ventilation plan
2). He believed that the respondent is the only mine
that has the "all faces" provision as part of its
ith the possible exception of U.S. Steel (Tr. 243).

State of Alabama the average methane liberation in th
working faces while coal is being cut is 25 cubic fee
minute, but at the respondent's mines, the methane li
at an active working face ranges from 300 to 500 cubi
minute, and under 300 cubic feet a minute at an idle
(Tr. 248). He conceded that he did not know how many
15 ignitions that he referred to occurred at the long
whether they occurred in situations similar to the fa
sented in this case. He also conceded that the 15 ig
in question are not relevant to the instant case (Tr.

Discussion

30 C.F.R. § 75.316 provides as follows:

> A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

30 C.F.R. § 75.2(g) provides as follows:

> (g)(1) "working face" means any place in a coal mine in which work of extracting coal from its natural deposit in the earth is performed during the mining cycle,
>
> (2) "Working place" means the area of a coal mine inby the last open crosscut,

section to and including the working faces,

(4) "Active workings" means any place in a coal mine where miners are normally required to work or travel;

30 C.F.R. § 75.302, provides in part as follows:

(a) Properly installed and adequately maintained line brattice or other approved devices shall be continuously used from the last open crosscut of an entry or room of each working section to provide adequate ventilation to the working faces for the miners and to remove flammable, explosive, and other noxious gases, dust, and explosive fumes, * * *. (Emphasis added.)

30 C.F.R. § 75.302-1(a) provides as follows:

(a) Line brattice or any other approved device used to provide ventilation to the working face from which coal is being cut, mined or loaded and other working faces so designated by the coal Mine Safety Manager, in the approved ventilation plan, shall be installed at a distance no greater than 10 feet from the area of deepest penetration to which any portion of the face has been advanced unless a greater distance is approved by the Coal Mine Safety District Manager of the area in which the mine is located. (Emphasis added.)

In Docket No. SE 85-109, Inspector McCormick issued Order No. 2481092 after finding that a ventilation brattice curtain installed 19 feet from the point of deepest penetration in the No. 2 entry (location "Y" as shown on sketch exhibit G-3). The inspector considered that location to be face in the working place which requires the curtain to be installed within 10 feet as stated in the respondent's ventilation plan. The facts show that a curtain was installed within 10 feet of the working face (location "X" on exhibit G-2), where the crosscut had been mined in the direction of that face. The parties agreed that any dispositive decisio based on these facts would be controlling in the remaining dockets, and I assume that the violations in the remaining dockets were issued after the inspectors found line curtain

installed at faces in the working places in excess of
10 feet provided for the plan.

The parties are in agreement that prior to 1984,
tions were issued at the subject mines for violations
to the ones involved here; that is, for failure to ma
line brattices to within 10 feet of an entry face, af
crosscut was turned.

The requirements for installing section and face
tion line brattice are found at page 10, paragraph 1,
respondent's ventilation plan (exhibit G-1). The per
plan provision in question provides as follows: "See
for typical section and face ventilation systems for
four, five and six entry sections. Line brattice sha
installed at a distance no greater than ten (10) feet
the deepest point of penetration."

The requirement for maintaining line brattice to
10 feet of all faces was not included as part of the
tion plan submitted by the respondent to MSHA for app
This provision was included in a June 7, 1984, letter
MSHA's acting district manager at the time the plan w
approved, and it provides as follows: "Line brattice
be maintained to within 10 feet of the area of deepes
tration of all faces in all working places inby the l
crosscut at all times except while roof bolting as sh
Sketches 11, 12 and 13."

During the course of the hearing, the respondent
that MSHA's intent in requiring line brattice to with
10 feet of all faces, including idle faces, is based
belief that turning a crosscut from the line brattice
the entry is not a good mining practice because the l
tain can never be maintained to within 10 feet of the
face of the crosscut while it is being mined during t
curtain-side turn.

Respondent also pointed out that its ventilation
do not require that brattices be maintained to within
of all faces, and that this requirement has been impo
the respondent by means of the ventilation plan appro
letters containing the language "all faces."

Respondent's counsel confirmed that the responde
present regularly contesting all violations which are
on MSHA's definition of a "face," and the application
10-foot line curtain

72 (Tr. 170-173). Respondent's counsel stated that the spondent has no choice in the matter when the plan is proved with the "all faces" proviso in it (Tr. 174). How-er, he also indicated that while the respondent has not in ct accepted this definition of a "face," it does not wish risk a mine closure for non-compliance. He also indicated at the issue has never been raised until these cases were tigated, and it is now contesting all cases in which this sue is presented (Tr. 173-174).

Respondent's counsel took the position that there is no tended distinction between the terms "face" and "working ce" and that they mean the same thing. He pointed out that r approximately 13 years no one thought that there was a stinction in the terms or that the terms had different mean-gs, and that the distinctions have been made by MSHA when began issuing citations and orders at its mines. Counsel ated that "MSHA is determined that we should not turn into e curtain on making crosscuts," and he insisted that con-nued compliance with the requirement that curtains be cated within 10 feet of all faces would result in unsafe ning practices (Tr. 208-211).

MSHA's counsel conceded that while the point of deepest netration where the alleged violation took place was not a rking face because no coal extraction was taking place, the ner face where the curtain was installed was a working ce, and that both locations were working places because ey were inby the last open crosscut (Tr. 125-126). Counsel so conceded that in the absence of the phrase "all faces," e failure by the respondent to maintain line brattice to thin 10 feet of a working face would constitute a violation section 75.302-1(a), and any inspector who found such a ndition would have to cite that specific standard as a vio-tion rather than the plan.

MSHA's counsel confirmed that the "all faces" require-nt was placed in the respondent's ventilation plan because the high liberation of methane. Counsel confirmed that e respondent's mines operate under the most stringent venti-tion plans, and that the respondent is the only mine oper-or with such a plan provision. He conceded that the plan ovision is there because MSHA put it there by the "cover eet" or approval letter accompanying the plan (Tr. 227-228).

Broderick in the prior case indicated that there had be
penetration at a similar "Y" location, and very little
similar "X" location, but that Judge Broderick nonethel
ruled that both locations were faces which required bra
curtains within 10 feet. Counsel also pointed out that
Broderick rejected any notion that the face which had r
penetrated was simply a rib (Tr. 130). In support of h
tion in all of these cases, counsel relies on the dicti
definition of the term "face" relied on by Judge Broder
(Tr. 130-131). Counsel conceded that if the plan had u
words "all working faces in all working places" instead
"all faces in all working places," the violations would
have issued in these cases (Tr. 128).

Respondent's counsel agreed that at the point in t
when the location "Y" was penetrated, it was in fact th
of the No. 2 entry. However, aside from the fact that
believed the cutting machine had simply "overcut" by 2
and that the penetration was a "mistake," he took the p
tion that once the machine turned away from that locati
starting driving and cutting the crosscut, location "Y"
not a working face because it was not being mined and h
been mined for at least several days before inspector
McCormick arrived on the scene. In counsel's view, at
time the inspector was there, location "Y" was simply a
but that eventually the crosscut would have been turned
the right off the entry, and the "rib" at location "Y"
have been mined through at some future time (Tr. 206-20

In the prior decision by Judge Broderick, he relie
the definition of a "coal face" as found in A Dictionar
Mining, Mineral and Related Terms, to support his concl
that the term is not limited to the time during which c
actually extracted, and that the term includes working
as well as faces from which coal has been or will be
extracted. If one were to use the definition of the te
"face" as found in the same dictionary, one could come
opposite conclusion. The term "face" is there defined
part as follows:

> * * * A point at which coal is being worked away, in a breast or heading; also working face. * * * The exposed surface of coal or other mineral deposit in the working place

ing. * * * The principal frontal surface presenting the greatest area such as the face of a pile of material, the point at which material is being mined. * * *

In the case of United States Steel Corporation v. Secretary of Labor, 1 FMSHRC 1024, decided August 10, 1979 by former Commission Judge Forrest E. Stewart, he vacated two alleged violations of 30 C.F.R. § 75.316, which charged that the operator had violated a provision of its ventilation plan which required line brattice to be maintained to within 10 feet of the deepest penetration of all working faces. In that case, the evidence established that no coal was actually being cut, mined or loaded when the inspector observed the alleged violative conditions. Judge Stewart ruled that line brattice was required to be maintained to within 10 feet of the area of deepest penetration of all working faces only when coal was actually being cut, mined or loaded.

Judge Stewart took note of the fact that mandatory standard section 75.302-1(a), specifically requires line brattice at the 10-foot distance only when coal is being cut, mined or loaded. Since this provision clearly designated the working face as that place at which brattice is to be maintained, Judge Stewart ruled that the modifying phrase "from which coal is being cut, mined or loaded" specified the time at which brattice is to be maintained, and he concluded that all working faces must be provided with line brattice meeting the 10-foot criteria during that time period.

Judge Stewart held that the language "all working faces" as contained in the operator's ventilation plan clearly did not mean that brattice be maintained at all times in all working faces. Although the ventilation plan was silent as to the time when the 10-foot line brattice was required during advance mining, he observed that this silence could not be construed as adding additional requirements to those found in section 75.302-1(a). He ruled that in order for the operator to be penalized for failure to maintain 10-foot line brattice at times other than those specified in the regulation, the approved plan should clearly have stated the additional requirements in such a way that clearly informed the operator of its obligations.

Judge Stewart also observed that it was obvious that the operator did not intend that brattice must be maintained within 10 feet of the working face at all times when it submitted its plan to MSHA for approval. He also observed that

to construe the plan in a manner which would require line brattice at all times, even when coal was not be mined or loaded, would create a conflict with the roc plan which contained a specific exemption. He noted inspector testified that there were times when the li tice did not have to be maintained to within 10 feet face since the roof-control plan allowed the removal brattice during roof bolting operations. This provis included in the roof plan because the line brattice p a hazardous obstruction during bolting. The inspecto tioned one occasion on which this obstruction resulte severe injury to a miner's arm.

Findings and Conclusions

MSHA's position for insisting that line brattice installed within 10 feet of all faces is premised on theory that methane can accumulate at idle faces, as working faces, and the fact that the respondent's min a history of liberating high amounts of methane. How MSHA presented no credible testimony or evidence to e that hazardous methane accumulations had occurred at areas cited by the inspectors in these cases. As a m fact, although MSHA introduced evidence of a number o methane igntions at the respondent's mines, ventilati cialist Meadows did not know how many of these involv face ignitions, nor could he supply the facts and cir stances under which these purported ignitions occurre

Mr. Meadows conceded that the law requires that faces in all working places be tested for methane, an if the tests were not made, a potentially hazardous c would be present (Tr. 246-247). If a test were made methane were detected, there would be no hazard. Fur methane were detected within 5 to 15 minutes after a indicated none present, the respondent would have to an opportunity to dispel the methane (Tr. 248). Mr. had no knowledge as to how many of the 15 methane ign occurred at the longwall, and assuming they all occur the longwall, he conceded that the fact that they occ would not be relevant to the facts presented in these (Tr. 250).

Respondent's ventilation manager McNider testifi the majority of methane ignitions which have occurred respondent's mines have occurred at the working face continuous miner was operating and scraping the mine He pointed out that such ignitions would not occur at

Mr. Meadows confirmed that the ventilation plan change which occurred in 1972 was the result of litigation arising from a methane ignition which occurred while a mining machine was scraping bottom after a line curtain was taken down from a working face which had been mined. The respondent was charged with a violation of section 75.316, but the case was dismissed after it was determined that coal was not being mined at the face and that the line curtain was within 10 feet of the face. Mr. Meadows confirmed that he testified in that case and agreed that the violation could not be supported.

I believe it is reasonable to conclude that MSHA's "all faces" requirement, which applies only to the respondent's mines, and no other mine operators nationwide, was added to the plan to cover a situation where a potential methane accumulation is presented at an idle face which had been mined and which no longer fits the definition of "working face" as defined by MSHA's regulations. If it is true that methane accumulates at idle faces as well as working faces, MSHA's adoption of this plan provision only for the respondent's mines, and not for other mines, appears to be discriminatory. While it is true that the respondent's mines have a history of high methane liberation, I cannot conclude that in those mines which liberate less methane, accumulations of methane at idle or non-working faces do not present the same potential for methane ignitions. All mines liberate methane, and it seems to me that if MSHA wishes to impose an "all faces" interpretation of the ventilation requirements of sections 75.316 and 75.302-1(a), it should do so through proper rule making rather than imposing them on a mine operator through the ventilation plan review process, or by adding such a requirement in a transmittal letter.

I also believe it is reasonable to conclude that MSHA is not too enchanted with the mining methods utilized by the respondent while driving and turning its crosscuts, and that its insistence on maintaining line brattices to within 10-feet of all faces in the working places is a subtle attempt to force the respondent to change its mining methods. During the course of the hearing, MSHA's counsel denied that this was the case, and he simply took the position that since the all-faces requirement was a part of the respondent's approved plan, it must be followed, and he implied that the respondent "was stuck with the plan provision."

I take note of the fact that the 10 foot "all fa
line brattice requirement contains an exception for r
ing accomplished in accordance with plan sketches 11,
Although this exception may cure an otherwise contrad
conflict with the "all faces" requirement, the same c
said for other parts of the plan which I find to be i
flict with MSHA's asserted "all faces" requirements.
plan provisions specifically use the term "working fa
Since that term is specifically defined by regulation
ing the respondent to maintain its brattice to within
of "all faces," a term not defined by the regulation,
a confusing conflict in the application of the plan a
whole.

The plan provision for installing section and fa
lation line brattice does not specifically state that
brattice must be within 10 feet of a face or working
and Mr. Meadows conceded that the plan itself "is not
specifically in the King's English that way" (Tr. 163
asked for an explanation, Mr. Meadows cited paragraph
page 10, which states in pertinent part that "A minim
17,000 cubic of air shall reach the end of the line b
where coal is cut, mined or loaded," and that by defi
this means the working face (Tr. 164). He stated tha
sketches found on page 11 depict the line curtain ins
methods in all working places, and that the optional
tilation system plan provisions found on page 12 depi
ing curtains" requirements when roof and rib bolting
servicing take place, and that the reference to a 10
mum distance from a face as shown on sketch 11, page
from a face "no matter if you want to define it as a
face or a face," (Tr. 165). He stated that the face
requirements for use when bolting takes place depicts
of a face, a face, if you want to call it a working f
face. They're one and the same" (Tr. 165).

In further explanation of Mr. Meadows' testimony
counsel stated that "I think the witness would constr
mean at least to be consistent with his approach that
they really meant to say "all faces in all working pl
and the District Manager simply set that out clearly
approval" (Tr. 169).

It seems clear to me that in that portion of the
tion plan dealing with the installation of blowing br
curtains while bolting or servicing the roof and rib,
of the term "face" is clearly intended to mean workin
In fixing the maximum distance

tates that "the entire blowing curtain may be taken down fter the permanent exhaust line curtain has been extended to thin 10 feet of the working face." Under the circumstances, conclude that all "face" references in the plan provisions or roof/rib bolting and servicing found at page 12, including he sketches found at page 13, are intended to apply only to he working faces.

The respondent's ventilation and methane and dust-control lan contains several additional requirements for maintaining roper air ventilation in the mines, and in each instance, the lan refers to working faces. The plan requirements for dust ontrol at the respondent's longwall, page 18, paragraph F, rovides that a minimum of 18,000 C.F.M.'s of air shall reach he working face where coal is being mined. The plan requirements for mine maps found at page 19 requires a mine map eference notation for average height and air velocity, as equired, at each working face. Page 4, paragraph 11, makes eference to a November 21, 1980, approved section 101(c) modification petition permitting the respondent to use belt air tries for coursing intake air to active working faces.

Inspector McCormick defined a "working face" as "an area rom which coal is being extracted on the mining cycle." She tated that there is no legal definition of the term "face," t she guessed that it would be "the area from which coal is o be extracted or is being extracted." When asked whether a planned" cut would be considered a "face," she answered in he affirmative. When asked whether a line curtain would be equired within 10 feet of that "planned" cut, she replied o." When asked to explain her answer, she replied "theoretically, this is a rib." She explained that the fact that a rib" had been penetrated, yet not "squared off" would make "a face" (Tr. 102-103). She confirmed that her understandg of MSHA's position is that a "face" is any location where operator plans to extract coal (Tr. 104). If this is true, hen the inspector's belief that a planned cut does not require ine brattice to within 10 feet, and MSHA's position that it oes are at odds with each other and are contradictory.

Mr. Meadows believed that the terms "faces" and "working ces" mean the same thing, and he believed that the requirent for maintaining line brattices to within 10 feet of the ce implies that they be so maintained to all faces, includg idle faces. In support of this conclusion, Mr. Meadows lied on "the history and literature on the subject of mine ntilation." The only cited literature is a February 1969

Bureau of Mines Report of Investigations 7223 entitl
Ventilation in Underground Bituminous Coal Mines (ex
ALJ-1). Mr. Meadows pointed out that the term "work
is not used in this publication, and he indicated th
continuous miner penetrates and extracts coal from a
does so from a working face. Once the miner ceases
the working face becomes simply a face, and he would
both as a "face."

MSHA's reliance on the publication cited by Mr.
to support a conclusion that the phrase "all faces"
idle faces as well working faces as defined in its r
tions is rejected. I take note of the fact that the
tion in question was published prior to the enactmen
1969 Coal Act and the 1977 Mine Act. While it is tr
the article does not use the term "working face," it
state that the basic objective of mine ventilation i
vide an adequate supply of uncontaminated air to the
areas, and that the volume of methane released from
face varies throughout the bituminous coal fields an
be predicted with certainty (pgs. 1, 15). Although
"active face" is not further explained, there is a s
inference that when used in conjunction with "workin
it means" active working faces.

The practice of supplementing ventilation plans
spondence appears to be a routine matter between MSH
this respondent. In a case recently decided by me i
these same parties, Docket No. SE 85-48, the identic
lation plan for the respondent's No. 4 Mine was in i
that case, in response to a July 14, 1984, approval
from MSHA's acting district manager, respondent's mi
ager, Ken Price, wrote a letter to the district mana
requesting approval to "point feed" its underground
lation at necessary locations. That request was app
a letter from the district manager, and the approved
and procedures for "point feeding" were specifically
ated as a supplement to the previously approved plan
were in fact subsequently incorported as part of the
itself when it was next reviewed. However, in the i
proceedings, the requirement for maintaining line br
to within 10 feet of the area of deepest penetration
faces has never been specifically made a part of the
dent's plan. It has apparently been included in the
manager's approval letters as a "proviso" to the pla
find this method of plan review and approval to be r
strange, and it supports the respondent's contention
never intended the all faces interpretation or appli

cluded it in the plan submitted to MSHA.

The respondent's contention that compliance with the quirement that line brattice be maintained to within -feet of all faces presents certain potential hazards is pported by the record. Inspector McCormick conceded that quiring a brattice curtain to be installed within 10-feet the face which had been penetrated presented a possible zard in that a visibility problem would be created between e shuttle cars and continuous miners, and they would have operate through the curtain (Tr. 123).

MSHA's ventilation specialist Meadows agreed that the spondent would have difficulty maintaining line brattice to thin 10 feet of the cited face while cutting coal at the rking face where a brattice had been installed to within feet (Tr. 154-155). Mr. Meadows also agreed that requir- g the brattice within 10 feet of the cited face in question uld present a hazard in that visibility would be curtailed d the air ventilation could possibly be short-circuited r. 184-185). Safety committeeman Dewberry stated that cause of the equipment operating in the crosscut area, it uld be impossible to maintain the brattice within 10 feet the cited face, and some of the curtain would have to be ken down (Tr 195).

I conclude and find that on the facts of these cases, quiring the respondent to adhere to the all faces require- nt imposed on it by MSHA by means of ventilation plan proval letters would result in exposing the miners to zards and accidents stemming from their inability to clearly serve men and equipment moving behind the line curtains cated in places where MSHA insists they be placed in order r the respondent to avoid citations. MSHA's witnesses agree at the potential hazards are real, and I believe that the cognition of these potential hazards and the safety concerns pressed by the respondent override any subtle attempts by HA to "nudge" the respondent into changing its mining thods. If MSHA believes that the respondent's present min- g methods are hazardous, it has an obligation to directly dress such situations rather than imposing unworkable plan quirements which in the final analysis result in additional tential hazards.

I further conclude and find that MSHA's application and terpretation of the all faces requirement it imposed on the spondent is inconsistent with the overall plan, as well as

mandatory standards 75.302 and 75.302-1(a). Although
ize that the respondent is not charged with a violatio
these standards, the regulatory intent for imposing th
requirements for the ventilation of working faces as e
passed in those standards as well as the overall plan,
insure a methane free working face atmosphere where ac
mining is taking place with miners and equipment prese

Mandatory safety standard section 75.316 requires
operator to adopt a suitable mine ventilation and meth
dust-control plan for its mine. Once approved by MSHA
plan becomes the applicable plan required to be follow
such time as it is revised, revoked, or otherwise chan
violation of the plan constitutes a violation of the r
ments of section 75.316. I conclude and find that at
the respondent submitted its plan to MSHA for approval
never intended that line brattice be required to be ma
within 10 feet of all faces. I assume that in the abs
this MSHA imposed requirement, the plan as submitted w
suitable for the mines in question.

MSHA's attempt to impose further requirements for
brattices at idle "faces" or "ribs" where coal is not
mined or cut only at the respondent's mines would in m
lead to conflicting and confusing applications of the
dent's overall plan, and it would impose additional re
ments on the respondent which other mine operators are
required to follow. I recognize the fact that section
provides flexibility in authorizing MSHA to require a
tion system and methane and dust-control plan suitable
prevailing conditions in a mine on a case-by-case basi
ever, in these proceedings I am not convinced that MSH
established that the respondent failed to follow a pla
able to the mine conditions in question. Since the re
here establishes that requiring the respondent to foll
all faces requirement for maintaining brattice curtain
result in additional hazards to miners, quite the cont
true. In my view, the resulting hazards render the pl
requirements unsuitable for the mines in question. Si
are, I find no basis for concluding that the responden
required to follow them, and I further conclude and fi
MSHA has failed to establish any violations of the cit
provision in question.

In view of the foregoing findings and conclusions
Nos. 2482922, 2481092, 2482911, and 2346556 ARE VACATE
MSHA's civil penalty proposals in connection with thes
orders ARE DISMISSED. The contestant's contest in Doc

In this case, the respondent is charged with the failure to maintain a continuous-mining machine in a permissible condition. The inspector found an opening in excess of .004 inches in the lid of the control box, and the machine was being used to cut and load coal from the faces.

The parties stipulated and agreed that the citation as issued accurately describes and evaluates the permissiblity violation of 30 C.F.R. § 75.503. The inspector who issued the citation was not available for testimony and the petitioner's counsel stated that he was out of state of other MSHA business.

Respondent does not dispute the fact that the conditons described on the face of the citation constitute a violation of section 75.503. Respondent presented no testimony or evidence with respect to this citation, and its counsel did not dispute the inspector's "S&S" finding. Counsel stated that he was only disputing the amount of the proposed civil penalty assessment proposed by MSHA ($850). The parties requested that I assess an appropriate civil penalty on the basis of the citation, the pleadings filed by the parties, and the statutory criteria found in section 110(i) of the case (Tr. 8).

The burden of proof in a civil penalty case with respect to the fact of violation and the proposed civil penalty assessment lies with the petitioner. In this case, the respondent has conceded that a violation occurred and that it was significant and substantial. Accordingly, the citation IS AFFIRMED.

The proposed civil penalty in this case was "specially assessed" pursuant to MSHA's civil penalty criteria and procedures found in Part 100, Title 30, Code of Federal Regulations. However, it is clear that I am not bound by these assessment regulations and have jurisdiction to assess a civil penalty for the violation de novo.

With respect to the six statutory criteria found in section 110(i) of the Act, the parties have stipulated to the following:

1. The respondent is a medium sized mine operator and the imposition of a civil penalty will not affect the respondent's ability to continue in business.

2. The violation was abated in good faith.

3. The respondent's history of prior violations is average.

I take note of the fact that abatement in this ca achieved within an hour and 10 minutes of the issuanc violation. I also note that the inspector found that violation was the result of moderate negligence on the of the respondent, and that the likelihood of the occu of the event against which the standard is directed wa sonably likely" and that two persons were exposed to a

In this case, the inspector found an opening betw cover plate and control box of the continuous-mining in excess of .004 of an inch. The machine was being at the face cutting and loading coal. Testimony in co tion with the other violations issued at this mine in case reflects that the mine liberally releases methan that methane ignitions have occurred in the mine. Un circumstances, I conclude that the violation presente sible ignition hazard and was serious.

With regard to the respondent's history of prior tions, although the parties stipulated that the respo has an "average" history of prior violations, I have what this means. MSHA has filed no information conce the respondent's history of prior violations, and I h basis for determining whether an increase or decrease initial assessment is warranted.

Civil Penalty Assessment

In view of the foregoing findings and conclusion taking into account the requirements of section 110(i Act, I cannot conclude that MSHA's initial assessment for the violation in question is unreasonable. Accor IT IS AFFIRMED.

ORDER

The respondent IS ORDERED to pay a civil penalty

SHA within thirty (30) days of the date of this order, and upon receipt of payment, the case is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

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Harold D. Rice, Esq., Jim Walter Resources, Inc., P.O. Box C-79, Birmingham, AL 35283 (Certified Mail)

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Gerald Reynolds, Esq., Jim Walter Corporation, P.O. Box 22601, Tampa, FL 33622 (Certified Mail)

fb

April 9, 1986

ANN RILEY OWENS, Complainant	:	DISCRIMINATION PR
v.	:	Docket No. LAKE 8
MONTEREY COAL COMPANY, Respondent	:	VINC CD 85-21
	:	Monterey No. 2 Mi

ORDER

Respondent, Monterey Coal Company (Monterey), m dismissal or summary decision on the ground the capt discrimination complaint fails to state a claim for relief may be granted and therefore the Commission l jurisdiction over the subject matter.

Complainant, a woman miner, appears pro se. Sh filed a 32 page verified, handwritten opposition. T is set for an evidentiary hearing in St. Louis, Miss April 22, 1986.

Monterey's motion is bottomed on the propositio complainant's admitted on-the-job foot injuries were self-inflicted, not work related, and therefore the that such injuries created an underground safety haz if true, was not a protected safety related activity this stage of the proceedings, I am not called upon determine the validity of Monterey's hypothesis. Co maintains her injuries were work-related -- the resu good faith attempt to comply with Monterey's metatar protective shoe policy. There is therefore a dispu of material fact.

It is well settled that on a motion to dismiss summary judgment all facts well pleaded must be acc unless it is shown there is no dispute as to the ma facts and that movant is entitled to judgment as a l law. Commission Rule 64; FRCP 12(b)(6), 56. Since parties rely on matters outside the pleadings, Mon motion has been treated as one for summary decision v. Stanton, 405 U.S. 669 (1972). Verified pleadin

Except in the clearest of cases, the Commission does not look favorably on motions for summary decision as they tend to deprive litigants of their day in court. Missouri Gravel Company, 3 FMSHRC 2470 (1981). This is especially true in pro se cases where the trial judge has a duty to satisfy himself all the relevant facts have been developed. Burns v. Asarco, 5 FMSHRC 1497, 1498 n.2 (1982).

The applicable standard for review of a motion for summary decision is the same as that applicable to a motion for summary judgment under Rule 56. This is that:

> "A summary judgment is authorized only if 'there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.' The function of the court on a summary judgment motion 'is limited to ascertaining whether any factual issue pertinent to the controversy exists; it does not extend to resolution of any such issue.' Once it is determined that material facts are in dispute 'summary judgment may not be granted,' and in 'making this determination doubts . . . are to be resolved against the granting of summary judgment.' To warrant summary judgment the record 'should show the right of the movant to a judgment with such clarity as to leave no room for controversy, and . . . should show affirmatively that the [adverse party] would not be entitled to [prevail] under any discernible circumstances . . . Summary judgment is an extreme remedy, and under the rule, should be awarded only when the truth is quite clear." Weiss v. Kay Jewelry Stores, Inc., 470 F. 2d 1259, 1261-62 (D.C. Cir. 1972).

A summary decision is particularly inappropriate in discrimination cases where "the inferences the parties seek to have drawn deal with questions of motive, intent and subjective feelings and reactions." Empire Electronics Co. v. United States, 311 F. 2d 175, 180 (2d Cir. 1962). Finally,

> "The burden on a party moving for summary judgment is affirmative: 'The party seeking summary judgment has the burden of showing there is no genuine issue of material fact, even on issues where the other party would have the burden of proof at trial, and even if the

(Citations omitted). That is, the moving party m
present affirmative evidence of facts that, if tr
would compel a judgment for that party . . . .

In assessing whether a party moving for summary j
has met his or her burden, a court must view all
inferences to be drawn from underlying facts in t
light most favorable to the party opposing the mo
(Citations omitted). McKinney v. Dole, 765 F. 2d
1134-1135 (D.C. Cir. 1985).

Under the Mine Act, unlawful reprisal occurs when
miner participates in a statutorily protected activity
an adverse employment action is taken against him or h
(3) a causal connection existed between the two. Here
complainant's verified opposition shows she participat
numerous acts of claimed protected activity, including
fact that on July 18, 1985 she reported, that due to t
disabilities suffered to her feet while working in the
Mine during the period July 15 to 18, she had become a
to her own safety and to that of her co-workers. With
respect to the second element, Ms. Owens pleadings and
opposition set forth numerous adverse actions such as
Monterey's continuing refusal to classify her injuries
work-related, (2) its refusal to reimburse complainant
the legal expense she incurred in prosecuting her own
workmen's compensation claim, and (3) regular and cont
acts of claimed job discrimination, vilification,
retaliation, and harrassment due to an anti-women mine
safety animus.

Third, it seems clear that if complainant's injur
were, in fact, work related as well as the proximate c
and justification for her refusal to work from July 18
1986 she has stated a claim for which relief, includin
injunctive relief, may be granted under the Mine Act i
of the many adverse actions alleged were motivated in
part by her safety complaints and activities. See, Se
on behalf of Dunmire and Estle v. Northern Coal Co., 4
126, 142 (1982); Rosalie Edwards v. Aaron Mining Co.,
FMSHRC 2035 (1983); Pratt v. River Hurricane Coal Comp
Inc., 5 FMSHRC 1529 (1983).

It is axiomatic that on a motion for summary deci
the trial judge cannot try issues of fact but only det
whether there are issues of fact to be tried. Once th
determined in the affirmative the motion must be rejec
This is true whether or not the case will ultimately b
to a judge or a jury.

The Mine Act and its legislative history show that if
s are to be encouraged to be active in matters of safety
ealth, they must be protected against any possible
imination which they might suffer as a result of their
cipation in enforcement of the Act. To further the
essional aim of making the Nation's coal mines safe
s to work, the concept of protected activity must be so
rued as to assure that miners will not be inhibited in
ay from exercising the rights afforded them by law.
an v. Stafford Const. Co., 732 F. 2d 954, 960, 961 (D.C.
1984)

Based on an exhaustive review of the record, I conclude
any issues of material fact and credibility presented
the granting of Monterey's motion improper, improvident
n abuse of discretion.

Accordingly, it is ORDERED that Monterey's motion be,
ereby is, DENIED.

Joseph B. Kennedy
Administrative Law Judge

ibution:

s C. Means, Esq., Crowell & Moring, 1100 Connecticut
e, N.W., Washington, DC 20036 (Certified Mail)

nn Riley Owens, 910 Morrison, St. Louis, MO 63104
ified Mail)

April 9, 1986

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEE
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 85-5-D
ON BEHALF OF	:	MSHA Case No. NORT CI
LARRY COLLINS,	:	
Complainant	:	Mine No. 1
v.	:	
	:	
RAVEN RED ASH COAL	:	
CORPORATION,	:	
Respondent	:	

ORDER OF DISMISSAL

Before: Judge Koutras

This proceeding concerns a temporary reinstateme cation filed by MSHA on December 26, 1984, on behalf complainant Larry Collins. The case was originally d VA 85-5-D, and Chief Judge Merlin issued an Order on 1984, requiring the temporary reinstatement of Mr. Co pending a hearing on the merits of his complaint. No action was taken on the reinstatement, and MSHA never enforcement of Judge Merlin's order. Subsequently, o August 23, 1985, MSHA filed its discrimination compla behalf of Mr. Collins, as well as another miner, Earl and the cases were assigned Docket No. VA 85-32-D.

On April 7, 1986, I issued my dispositive decisi Docket No. VA 85-32-D. Under the circumstances, the reinstatement petition filed on behalf of Mr. Collins and this matter should be dismissed. Accordingly, th docketed as VA 85-5-D is dismissed.

George A. Koutras
Administrative Law Judg

abor, 4015 Wilson Boulevard, ROOM 1237A, Arlington, VA
3 (Certified Mail)

el R. Bieger, Esq., Copeland, Molinary & Bieger, P.O.
1296, Abingdon, VA 24210 (Certified Mail)

v.	:	Citation No. 2833830;
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Cottonwood Mine

DECISION

Appearances: Timothy M. Biddle, Esq. and Peter K. Levine
Crowell & Moring, Washington, D.C.,
for the Contestant;
James H. Barkley, Esq., Office of the Solic
U.S. Department of Labor, Denver, Colorado,
for the Respondent.

Before: Judge Morris

This is a contest proceeding initiated by contestant against the Secretary of Labor in accordance with the Fed Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et se (the Act).

A hearing on this case and related cases commenced c March 5, 1986 in Salt Lake City, Utah.

At the hearing contestant renewed its motion to with its Notice of Contest. No person objected to the motion.

Pursuant to Commission Rule 11, 29 C.F.R. § 2700.11, contestant's motion is granted and the case is dismissed.

John J. Morris
Administrative Law Judge

Distribution:

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FALLS CHURCH, VIRGINIA 22041

April 10, 1986

ECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 85-226-D
ON BEHALF OF	:	
OHN G. KLINE,	:	MORG CD 85-7
Complainant	:	
	:	Loveridge No. 22 Mine
v.	:	
	:	
ONSOLIDATION COAL COMPANY,	:	
Respondent	:	

ORDER OF DISMISSAL
DECISION APPROVING SETTLEMENT

efore: Judge Maurer

The Secretary has filed a motion explaining that pursuant agreement between the parties, the complainant now has re-ived or will receive all the relief sought in this case.

The Secretary further has moved for approval of a civil enalty in the amount of $200 for the violation of section 05(c) of the Act. The Secretary further has discussed the roposed settlement in light of the six statutory criteria et forth in section 110 of the Act. Based upon my review of he Secretary's motion I am satisfied that the proposed ettlement is consistent with the purposes and spirit of the tatute.

In light of the foregoing the proposed settlement is PPROVED and the operator is ORDERED TO PAY $200 within 30 ys from the date of this decision. Further, the Secretary's tion to withdraw the complaint of discrimination is GRANTED d this matter is hereby DISMISSED.

Roy J. Maurer
Administrative Law Judge

stribution:

vette Rooney, Esq., Office of the Solicitor, U. S. Department Labor, 3535 Market St., Philadelphia, PA 19104 (Certified

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. LAKE 85-75- Order No. 2330535; 4/ Nelms No. 2 Mine

DECISION

Appearances: Robert Kota, Esq., Youghiogheny and Ohio Company, St. Clairsville, Ohio, for Conte
Patrict M. Zohn, Esq., Office of the Soli
U.S. Department of Labor, Cleveland, Ohio
Respondent.

Before: Judge Melick

These consolidated proceedings are before me upon Notices of Contest filed by Youghiogheny and Ohio Coal Company (Y&O) under section 105(d) of the Federal Mine and Health Act of 1977, 30 U.S.C. § 801 et seq., the "A to challenge the issuance by the Secretary of Labor of withdrawal orders (Nos. 2330533 and 2330535) under the visions of section 104(d)(2) of the Act.[1]/

1/ Section 104(d)(2) provides as follows:
"If a withdrawal order with respect to any area i coal or other mine has been issued pursuant to paragrap a withdrawal order shall promptly be issued by an autho representative of the Secretary who finds upon any subs inspection the existence in such mine of violations sim to those that resulted in the issuance of the withdrawa under paragraph (1) until such time as an inspection of mine discloses no similar violations. Following an ins tion of such mine which discloses no similar violations provisions of paragrpah (1) shall again be applicable t mine."
Section 104(d)(1) provides as follows:
"If, upon any inspection of a coal or other mine, authorized representative of the Secretary finds that has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditio created by such violation do not cause imminent danger violation is of such nature as could significantly and stantially contribute to the cause and effect of a coal other mine safety or health hazard, and if he finds su violation to be caused by an unwarrantable failure of operator to comply with such mandatory health or safet standards, he shall include such finding in any citati given to the operator under this Act."

Hearings were held concerning the merits of these order on September 25, 1985, but a final decision was deferred pending decisions by other judges concerning the validity of the underlying section 104(d)(1) citation and order that wer conditions precedent to the validity of the orders at bar. determination upholding the violations cited in the instant orders and a finding that the violations were caused by the "unwarrantable failure" of the mine operator were previously made by decision of the undersigned dated October 29, 1985 (Secretary v. Youghiogheny and Ohio Coal Company, Docket No. LAKE 85-90, Appendix A).

The underlying citation (No. 2331148) and order (No. 2328954) were subsequently upheld respectively by decisions of Commission Judges in Youghiogheny and Ohio Coal Company v Secretary of Labor, Docket No. LAKE 85-76-R (March 7, 1986, Judge Maurer), and Secretary of Labor v. Youghiogheny and Ohio Coal Company, Docket No. LAKE 85-63 (February 4, 1986, Judge Broderick). Accordingly the section 104(d)(2) orders at bar (Orders Nos. 2330533 and 2330535) are affirmed and th contests of those orders are dismissed.

Gary Melick
Administrative Law Judge

Distribution:

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Patrick M. Zohn, Esq., Office of the Solicitor, U.S. Department of Labor, 881 Federal Office Building, 1240 East Ninth Street, Cleveland, OH 44199 (Certified Mail)

rbg

DEC 19 1985

APPENDIX A

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. LAKE 85-90
	:	A.C. No. 33-00968-03605
v.	:	
	:	Nelms No. 2 Mine
YOUGHIOGHENY & OHIO COAL CO., Respondent	:	

DECISION

Before: Judge Melick

This case is before me on remand by the Commission on December 12, 1985, to "enter the necessary findings as to each of the six statutory penalty criteria supporting" the $750 penalty assessment for the violation of the regulatory standard at 30 C.F.R. § 75.305.[1]

The violation as charged in Order No. 2330535 reads as follows:

> The absence of dates, times and initials indicates that the weekly examinations of the left and right return air courses were not being conducted. There was [sic] no entries made in the approved book on the surface that the return air courses had ever been examined on a weekly basis.

Youghiogheny & Ohio Coal Company (Y&O) does not dispute that the cited standard requires weekly examinations to be performed in the left and right return air courses as alleged and that the person making such examinations is required to place his initials and the date and time at the place

---

[1]The penalty criteria are as follows:

"The operator's history of previous violations, the appropriateness of such penalty to the size of business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achi[illegible] after notifi[illegible]

dates, times or initials of mine examiners or any other evidence that any part of the 1,300 feet of the right and left air courses had ever been examined in accordance with the cited standard.[2]

Jeffers and Statler returned to the surface and examined the books in which the examinations of the cited air courses were required to be recorded. Assistant Mine Safety Director Robert Oszust joined in the examination. At that time neither Don Statler nor Robert Oszust was able to show Jeffers any evidence of entries corresponding to inspections of the cited air courses. Indeed Y&O continued to admit as recently as when it filed its Answer in these proceedings on September 12, 1985, that the examinations had not been recorded. At the hearings in this case however, only 13 days later, Statler testified that entries in the record book did exist and that they corresponded to examinations of the air courses on February 6, 1985, February 16, 1985, February 21, 1985, February 27, 1985, March 6, 1985 and March 13, 1985.

The entries are not however so unambiguous as to permit the unquestioned acceptance of this testimony. Moreover the one person who could have clarified this matter and answered the more important question of whether the air courses were actually inspected was not called as a witness by the mine operator and his absence was not explained. This person was Bill Dennis, the fire boss who it is now purported conducted the first five of the examinations. Under the circumstances Statler's testimony in this regard is without a credible foundation.

Within this framework I conclude that, with one exception, the required weekly examinations of the air courses had not been made from February 6, 1985 to April 9, 1985. The one exception is based upon Statler's testimony that he saw substitute Fire Boss Roy Kohler perform an examination of the air courses on March 13, 1985. Statler also admits however that he does not know whether any weekly examinations were performed between March 13 and April 9, 1985, and concedes that there were no entries in the record book corresponding to any examination between those dates.

---

[2]Statler testified that he found one notation pad on the outside of the A Entry return regulator but there is no indication that there were any entries on that pad.

According to the undisputed testimony of inspe
Jeffers, the failure to conduct weekly examinations c
lead to the accumulation of float coal dust in the ci
courses. Indeed it is undisputed that float coal dus
fact present throughout at least 500 to 600 feet of t
return air course at the time of this inspection and
admittedly an unsafe condition and a violation of the
standard at 30 C.F.R. § 75.400.

According to Jeffers areas of the mine contain
ignition sources such as electrical equipment includi
ventilation fans, a battery charger and a rock dustin
machine, were vented directly into the air courses.
opined that the accumulations of float coal dust in t
courses could propagate fire or explosions from those
exposing the seven miners working inby to serious in
Jeffers also observed that there had been a prior ign
this mine of hydrogen gas from one of the battery cha
Statler testified that he was not aware of such ignit
sources but did not contravene Jeffer's testimony in
regard. Under the circumstances I find that the vio
herein was quite serious. The hazard was particular
aggravated by the lengthy period during which the exa
tions had not been performed. Indeed each failure t
a weekly examination at each required location could
properly been charged as a separate violation subjec
separate civil penalty.

The violation was also the result of operator
gence. The fact that proper examinations were not b
performed should have been obvious from the absence
required notations in the air courses. In addition
existence of admittedly violative amounts of float c
over 500 to 600 feet of the right return air course
area frequented by supervisory personnel should have
the discovery of this violation. Indeed Safety Dire
Statler conceded that a section foreman should have
covered the float coal dust in the air course and wa
"surprised" that it had not been found.

In addition since both the Mine Safety Directo
assistant were apparently unable to determine (until
Safety Director testified at hearing) from the ambig
entries in the record book that proper examinations
air courses were being made it is apparent that at t
least the entries were not adequate to clearly show
ment that the examinations were in fact being made.
additional reason the mine operator should have beer

criteria. It was stipulated that the mine operator was of "moderate" size and that the proposed penalties would have no affect on its ability to continue in business (Tr. 5). The undisputed history report of violations (Ex. G-11) shows that overall the operator had a record preceding the date of the order at bar of 3,592 paid violations including 12 paid violations of the regulatory standard at issue. For the 2 years preceding the order at bar there were 515 paid violations including 4 paid violations of the standard at issue. This is not a good record.

I also gave credit in assessing a $750 penalty for the operators demonstrated good faith in attempting to achieve rapid compliance after notification of the violation. The order in this case indicates on its face that both the left and right return air courses were subsequently examined by a representative of the mine operator and the results were recorded in the approved book.

Gary Melick
Administrative Law Judge

Distribution:

Patrick M. Zohn, Esq., Office of the Solicitor, U.S. Department of Labor, 881 Federal Office Building, 1240 East Ninth Street, Cleveland, OH 44199 (Certified Mail)

Robert C. Kota, Esq., The Youghiogheny & Ohio Coal Company, P.O. Box 1000, St. Clairsville, OH 43950 (Certified Mail)

rbg

FEDERAL MINE SAFETY AND HEALTH REVIEW COMM
OFFICE OF ADMINISTRATIVE LAW JUDGES
333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

April 21, 198

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCE Docket No. WEST 85- A.C. No. 42-00079-0
v.	:	Emery Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

Appearances: James H. Barkley, Esq., Office of the S
U.S. Department of Labor, Denver, Color
for Petitioner;
Hal Pos, Esq., Parsons, Behle & Latimer
City, Utah,
for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Sa
Health Administration, charges respondent with violat
regulation promulgated under the Federal Mine Safety
Act, 30 U.S.C. § 801 et seq., (the Act).

After notice to the parties a hearing on the mer
place in Salt Lake City, Utah on February 13, 1986.

The parties waived their right to file post-tria
and, in lieu thereof, orally argued their cases.

Issue

The issue is whether there was an unwarrantable
the part of the operator to comply with a ventilatio

Citation

Citation 2503093 charges respondent with violat
§ 75.316. The cited regulation provides as follows:

mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

Stipulation

At the commencement of the hearing the parties stipulated as llows: the air velocity at the working face was not maintained the required 6000 cubic feet per minute (CFM). Respondent ereby violated its ventilation plan and the regulation. In dition, there had been no intervening clean inspection between prior (d)(1) citation issued February 26, 1985 and the (d)(1) tation in the instant case. Finally, the parties agreed that e proposed penalty of $255 is appropriate if the violation was e to the unwarrantable failure of the operator to comply; if , then the penalty should be for a lesser amount (Tr. 5-7).

Summary of the Case
The Secretary's Evidence

Robert Lee Heggins, an MSHA inspector experienced in mining, spected respondent on May 13, 1985 (Tr. 8-11). On this casion he was accompanied by Steve Behling, the company's fety director (Tr. 11). When the men walked into the No. 5 try of 2 West Main the inspector observed that the curtain was rtly blown in at crosscut 29 (Tr. 12, 13). As they proceeded rther the inspector also saw that the mine curtain was sagging several locations (Tr. 11, 13). Continuing on, the inspector ticed that a trailing cable had pulled the curtain against the b causing a restriction of the air flow to the working face r. 15).

When he approached the face the inspector saw dust in the r as the shuttle car in crosscut 30 was being loaded. In his sition he did not feel the free flow of air that one would rmally expect (Tr. 16). The absence of the air flow and the ndition of the curtain convinced the inspector that there was a ilure of the air flow at the face (Tr. 16).

After he observed the coal being loaded into the shuttle car e inspector attempted to take an anometer reading; the device

The curtain shouldn't have been hung in this fashion. (
18). The third problem contributing to the air flow re
was caused by the trailing cable as the equipment made
right turn into the working face (Tr. 32). It would be
to expect a trailing cable to contact a brandish curtai
circumstances. In the inspector's view the cable had b
pulling against the curtain since this shift began, for
hour to an hour and a half (Tr. 33, 34).

The inspector watched the shuttle car being loaded
to three minutes before issuing his order. In this per
neither foreman Petty nor anyone else attempted to rees
ventilation (Tr. 24). Supervisor Petty, who was in the
the dust, should have sensed a lack of air sweeping ove
He should have realized there was a failure of the vent
(Tr. 23).

The violative conditions were abated by straighter
curtain at crosscut 29; by fixing the sagging curtain
entry and by placing an object to keep the curtain from
contacting the rib (Tr. 33-35).

Consolidation Coal's Evidence

Horace Petty (section foreman), David Day (miner
Richard Childs (continuous miner operator) and Steve Bo
(safety supervisor) testified for respondent.

The section foreman, Horace Petty, indicated that
cut 29 they had spadded the curtain to the floor two or
feet toward the direction of entry 6 (Joint Exhibit No
trates the placement of the curtain). This placement
prevent any shuttle cars from snagging it as they turne
corner. Placement of the curtain in this fashion had
caused a ventilation problem. The fire boss had a read
17,000 CFM before the shift started mining that mornin
39, 46, 47).

If there had been any gaps in the curtain Petty wo
noticed them. The top is not perfectly level and there
been an inch or two spacing at the top. Such openings
cause much loss of air (Tr. 51, 52, 64).

The curtain had not been pushed against the rib wi
went up the entry that morning at about 7:20. The cur
spadded to the top, as well as the floor, along all en
(Tr. 39). He went up the entry an additional three or
before the violation occurred.

were loading the shuttle car and Petty signaled them to stop
41, 42, 80). Since the shuttle car was loaded he directed th
to back it away from the face. It took the operator about te
seconds to stop (Tr. 41, 42). As the miner was backed out MS
inspector Heggins stopped them (Tr. 42). About 10 to 15 seco
had elapsed (Tr. 43). Petty had stopped the mining operation
before he knew the MSHA inspector was present (Tr. 63).

In order to reestablish ventilation after the miner was
down, the employees pulled the curtain out and spadded it bac
the floor (Tr. 52, 53). They started from the face and walke
the whole curtain line, tightening all gaps, checking all spa
and cracks (Tr. 55). After the gaps were fixed, after the
restriction was removed at the corner and after the curtain w
moved at crosscut 29 there was sufficient ventilation (Tr. 5

According to witness Petty the curtain, as it hung from
ceiling, was properly installed in the first place. They re-
tightened it after the citation was issued in order to get th
maximum amount of air to the face (Tr. 58).

In Petty's opinion, changing the position of the brandis
curtain at crosscut 29 did not contribute to an increase in
air flow (Tr. 61).

Closing the gaps along the curtain from the working face
crosscut 29 contributed an additional two or three thousand c
feet of air flow (Tr. 61). The trailing cable pinching the
curtain was the main problem. Petty had stopped to take care
it (Tr. 62). This particular condition was abated by moving
curtain back from the rib and spadding it to the floor (Tr.

David Day, a miner operator, described his activities on
this day as well as the inspections made by the section foren
(Tr. 65-67).

Shortly prior to the inspection the water line had to be
repaired. After the line was repaired it took about 15 or 2
seconds to finish loading the car (Tr. 68, 70). As they fin
loading Petty came through the curtain and signaled them wit
light to stop mining. They stopped and backed the shuttle c
away from the continuous miner. As they were backing up Beh
and inspector Heggins told them to stop (Tr. 68, 71). In Da
opinion, before the water line was fixed, the three-inch tra

This portion of the mine is a very dry and dusty secti
The ventilation seemed okay (Tr. 71, 76). There was no gas
this face (Tr. 78). Day estimates 50 to 70 trips were made
day by the shuttle car (Tr. 74).

At the time of the incident witness Richard Childs had
absent from 2 Main West for approximately 30 minutes. Upon
turning he found the water line had been repaired and the s
car was 1/2 to 3/4 full. He then replaced Day as the opera
and moved the miner back into the face and started cutting
had already mined about 60 feet into crosscut 30. Childs c
pleted filling the car in 20 to 30 seconds (Tr. 84-87, 94)

Day motioned to Childs that the car was filled. Child
saw Horace Petty shaking his light directing them to stop
mining. He then started to back away from the face. At th
point the MSHA inspector appeared and directed him to shut
the miner, which he did. There was no dust because the min
hadn't been operating (Tr. 87-89, 93). Childs did not not
lack of air flow across his body nor did he notice any air
problem (Tr. 92, 96).

Other than spadding the curtain, no other precaution h
been taken to keep the trailing cable from collapsing on th
curtain. Spadding is usually sufficient but a temporary po
jack had not been used to block the curtain from moving aga
the rib (Tr. 94, 95). Childs estimated that the trailing c
was 1 1/2 inches thick (Tr. 99).

Steve Behling, Consolidated's safety supervisor, accom
MSHA inspector Heggins during the inspection. Behling took
inspector to 2 Main West because that section was probably
the best in the mine (Tr. 100, 101).

When the two men approached entry 5 no comment was mad
cerning the curtain at crosscut 29. The men saw the cable
against the curtain and Behling knew there was a problem.
around the corner, Behling saw Petty waving his light to sh
down the miner operator (Tr. 101-106). Inspector Heggins c
tinued on and got out his anometer. It wouldn't turn and h
said the company was under an order situation (Tr. 103).

After the mining activity was discontinued the curtain
picked up and pulled out. Behling rechecked and found they
had no air (Tr. 105). They then started pushing the curtai
At that point Heggins got an air reading of about 6100 (Tr

miners as well as the foreman. Behling concluded that the wat
line breakdown, the movement of the shuttle car into the
crosscut, the almost full shuttle car, the fact that equipment
always backed away from the face and the actions of Petty, caus
him to believe that there were two ways of viewing the situati
(Tr. 109-113). He also believed that Heggins and Petty were o
opposite sides of the curtain as they approached the face (Tr.
111).

As soon as Petty recognized the problem he properly shut down the mining operation (Tr. 111, 122).

Even though the shuttle car cable and the obstruction had been removed the air was insufficient; the curtain doesn't fal all the way back into position (Tr. 116, 117). After the cabl was pulled out it wasn't immediately spadded to the floor.

To reestablish the ventilation the miners started at the face and went out from there. As they progressed they pushed, spadded down and laid chunks of coal on the curtain. Activity that type would cause a lower air reading (Tr. 118, 119).

In Behling's opinion when the shuttle car started up the cable moved against the curtain and pulled the spad out. The time interval was about 15 seconds (Tr. 121, 122).

Discussion

The Commission has defined the statutory term of "unwarrantable failure" to mean a violation resulting from indifference, willful intent or serious lack of reasonable care, Section 104(d)(1); Westmoreland Coal Company, 7 FMSHRC 1338 (September 1985); U.S. Steel Corp., 6 FMSHRC 1423, 1437 (June 1984).

In this case I find that the respondent's evidence is credible. In short, the MSHA inspector and the company's sect foreman arrived at the ventilation problem from different side of the brandish curtain at approximately the same time. While the presence of a section foreman is not necessary to establis an unwarrantable failure I find the violative events occurred the short period of approximately 20 seconds as claimed by the operator.

The Secretary argues extensively (Tr. 124-131) that his evidence is credible and the operator's is fatally flawed.

Concerning crosscut 29: Joint Exhibit No. 1 illustrates placement of the curtain. I am unable to see how the positi the curtain as shown on the exhibit could interfere with the flow. The witnesses referred extensively to the exhibit throughout the hearing. I agree with section foreman Petty the curtain placement at crosscut 29 did not affect the air The operator had moved the curtain to that position to preve the shuttle cars from snagging it as they turned at the cros

The second facet concerns the gaps or sags in the curta MSHA's evidence is not precise on this point. I credit the operator's evidence that the minimal spacing at the top caus the loss of no more than 3000 to 4000 CFM from the measured flow of 17,000 CFM.

The final asserted defect is that the curtain had been pushed against the rib by the trailing cable. Everyone recognized that this condition effectively restricted the ai flow. I do not find it credible that this restriction could existed for an hour to an hour and a half as the inspector asserts. I credit witness Day's contrary opinion that the c snapped tight and pulled out the bottom of the curtain as th miner went around the corner after the water line had been f The time involved was less than 30 seconds.

A credibility issue also arises as to whether the inspe watched the mining of the coal for two or three minutes or whether the shuttle car was filled in 10 to 15 seconds. Pet Day and Childs all confirmed the short period of time involv Inasmuch as Day and Childs loaded the car they would be in t best position to know the extent to which it had been filled conversely, the amount of time necessary to finish loading i

For the foregoing reasons, I conclude that the conduct the operator did not constitute an unwarrantable failure to comply with the ventilation regulation. Accordingly, the allegations of unwarrantable failure should be stricken.

The facts and the stipulation of the parties confirm th the operator violated 30 C.F.R. § 75.316. Accordingly, the citation should be affirmed.

Further, based on the stipulation, the evidence and the statutory criteria pertaining to the assessment of civil penalties, 30 U.S.C. § 820(i), I deem that a penalty of $100 appropriate.

1. The Commission has jurisdiction to decide this case.

2. Respondent violated 30 C.F.R. § 75.316.

3. The conduct of respondent did not constitute an nwarrantable failure to comply with the above regulation.

4. Citation 2503093 should be affirmed and a civil penalt ssessed therefor.

ORDER

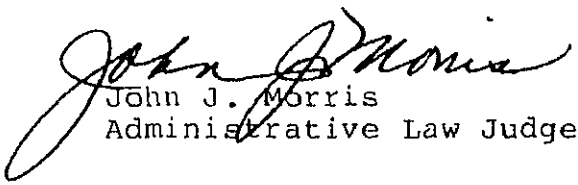
Based on the foregoing facts and conclusions of law, I ent he following order:

1. The allegation that respondent's conduct constituted a nwarrantable failure to comply with the regulation is stricken

2. Citation 2503093 is affirmed.

3. A civil penalty of $100 is assessed.

4. Respondent is ordered to pay to the Secretary the sum 100 within 40 days of the date of this decision.



John J. Morris
Administrative Law Judge

istribution:

ames H. Barkley, Esq., Office of the Solicitor, U.S. Departmer f Labor, 1585 Federal Building, 1961 Stout Street, Denver, CO 0294 (Certified Mail)

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blc

2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

April 21, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEE Docket No. WEVA 85-2 A.C. No. 46-01433-03
v.	:	Loveridge Mine
OTIS ELEVATOR COMPANY, Respondent	:	

ORDER APPROVING SETTLEMENT AGREEMENT

Appearances: Howard K. Agran, Esq., Office of the Soli U.S. Department of Labor, Philadelphia, P vania, for Petitioner; W. Scott Railton, Reed, Smith, Shaw & McClay, Washington, D for Respondent.

Before: Judge Broderick

When the above case was called for hearing in Pitt Pennsylvania on March 18, 1986, Petitioner made a motio the record for approval of a settlement agreement reach by the parties to this proceeding.

The case involves a single citation, charging a vi of 30 C.F.R. § 75.511 because an unqualified person was performing electrical repairs on an automatic elevator. MSHA contended that the violation contributed to an inj because the repairman did not notify mine management th was going to work on the elevator, and a miner was inju while attempting to board it. The violation was origi assessed at $500.

In his motion counsel states that the repairman i question had not taken the West Virginia examination f mine electrical work, but the government does not cont that he is not technically qualified to do electrical The government is not able to state that the violation contributed to the injury. The government does not al that the work performed by the repairman violated any safety standard. Respondent is a large company, has a

ORDERED to pay the sum of $375 within 30 days of the date this order.

James A. Broderick
Administrative Law Judge

tribution:

ard Agran, Esq., U.S. Department of Labor, Office of the icitor, 3535 Market Street, Philadelphia, PA 19104 (Certified l)

Scott Railton, Esq., Reed, Smith, Shaw & McClay, Suite 900, 0 Connecticut Ave., N.W., Washington, D.C. 20036-4192 rtified Mail)

DON KEEN, WILLIAM HENSLEY, HUBERT D. ROWE, ARVIL ARWOOD, JERRY BARRETT, KERMIT BARNART, and JACK COLE, Complainants	:	DISCRIMINATION PROCEEDING Docket No. VA 86-4-D MSHA Case No. NORT CD 85-
v.	:	
GARDEN CREEK POCAHONTAS COMPANY, Respondent	:	Virginia Pocahontas No. Mine

DECISION

Appearances: Gerald F. Sharp, Esq., Castlewood, Virginia, for Complainants;
Thornton L. Newlon, Esq., Campbell & Newlon, P.C., Tazewell, Virginia, for Respondent.

Before: Judge Melick

This case is before me upon the complaints by the name individual miners under section 105(c)(3) of the Federal Min Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., the "Act," alleging that each was laid-off from the Garden Creek Pocahontas Company (Garden Creek) on October 22, 1984, in violation of section 105(c)(1) of the Act.[1]/ They are each seeking back-pay from that date until they returned to work on January 2, 1985, with accrued benefits and interest.

on 105(c)(1) of the Act provides in part as follows
person shall discharge or in any manner discrim-
ist or cause to be discharged or cause discrimina-
t or otherwise interfere with the exercise of the
ights of any miner, . . . in any coal or other
t to this Act because such miner, . . . has filed
omplaint under or related to this Act, including
otifying the operator or operator's agent, or the
ive of the miners at the coal or other mine of an
ger or safety or health violation in a coal or
. . . or because of the exercise by such miner,
half of himself or others of any statutory right
this Act."

an activity protected by that section and that the lay-off o discharge they suffered was motivated in any part by the pro tected activity. Secretary ex. rel. David Pasula v. Consolidation Coal Company, 2 FMSHRC 2686 (1980), rev'd on other grounds sub. nom. Consolidation Coal Company v. Marshall, 66 F.2d 1211 (3rd Cir. 1981). See also Boitch v. FMSHRC, 719 F.2d 194 (6th Cir. 1983) and NLRB v. Transportation Management Corp., 462 U.S. 393 (1983), affirming burden of proof allocations similar to those in the Pasula case.

The Complainants specifically allege that officials of Garden Creek threatened to lay them off and in fact subsequently laid them off for the failure of the union local, of which they were members, to waive as a condition of employment the "requirements of [a] safeguard and grievance settlement concerning a 'dispatcher' to control traffic on idle days".2/ They claim that their refusal to work without a full-time "dispatcher" was a protected activity and that their lay-off based on that work refusal was therefore in violation of the Act.

It is indeed well established that a miner's exercise of the right to refuse work is a protected activity under th Act so long as the miner entertains a good faith and reasonable belief that to work under the conditions presented woul be hazardous. Miller v. FMSHRC, 687 F.2d 194, (7th Cir. 1982); Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981). For the reasons set forth in this decision however, I do not find that the miners' work refusal in this case was based on such a belief. Accordingly whether or not their lay-off or discharge was motivated by that work refusal, their complaint herein must fail.

According to Kenneth Lester, vice-president of Local 2421 of the United Mine Workers of America (UMWA) and chairman of the mine committee, he was called into a meeting on October 19, 1984, by mine superintendant Vern Reynolds. Reynolds called the meeting to announce a lay-off and to advise the union of the company's plans for an impending idl period in a non-producing status. Reynolds reportedly state that the company intended to lay-off everyone except 14 of the union miners and that 7 of the 14 would be assigned to underground work during this period.

2/ Although the duties of a "dispatcher" were never precisely defined in this case it appears that a "dispatcher" coordinates rail traffic in the mine.

meeting followed on October 21, at which the membership
to insist upon the employment of a full-time "dispatche
a pre-condition for their continued underground work du
the contemplated idle period.

On October 22, there was another meeting with Rey
According to Lester, Local 2421 president Donny Lowe to
Reynolds at this meeting that the union wanted a "dispa
to control the underground traffic and Reynolds respond
that under the circumstances he would then lay-off the
underground men. Lester testified that Reynolds then t
phoned his superior, Rufus Fox. He overheard Reynolds
on the phone that the union was asking for a "dispatche
Reynolds then hung-up and said he would lay-off the sev

The testimony of Lester is corroborated in essent
respects by other witnesses called by the Complainants
including the then general mine foreman George King. K
testified that sometime during the meeting on October 2
someone said there would be no one working underground
without a "dispatcher" and Reynolds responded that ther
would then be no one working underground. In his post-
hearing deposition Reynolds also acknowledged that he t
the union representatives that "we would work seven men
ground with no dispatcher or we would work no men under
ground." The Complainants' allegations in this regard
therefore accepted as an accurate accounting of events.

The Complainants argue that their work refusal un
the circumstances was based on a "reasonable, good fait
belief" that for seven miners to work underground witho
full-time dispatcher during the idle period would have
hazardous. This argument is based on their purported
reliance upon a safeguard notice that had been issued b
Inspector Charlie Wahles of the Federal Mine Safety and
Health Administration (MSHA) on April 13, 1982. They
maintain that it would have violated that safeguard to
continued working without the additional employment of
full-time dispatcher and that a violation of the safegu
would constitute per se a dangerous condition justifyin
work refusal under the Act.

I do not find however that the Complainants could
reasonably have believed that the safeguard would have
violated under the circumstances. The safeguard notice

since the mine has been in a non-producing status, the dispatcher has been eliminated. Several persons are still employed on each shift in different areas of the mine (approximately 35). Man trips and other mine traffic have been operating to and from the sections and other work areas with no assurance that they have a clear road. This is a notice to provide safeguards requiring that man trips or other mine traffic be under the direction of a dispatcher or other competent person designated be the operator and that man trips or other mine traffic shall not be permitted to proceed until the operator of the man trip or other mine traffic is assured by the dispatcher or other competent person that he/she has a clear road.

The safeguard on its face does not limit the mine operator to the use of only a full-time "dispatcher" but allows him to use any "competent person," full-time or part-time, to perform the same function. In addition, in the case of Secretary v. Southern Ohio Coal Company, 7 FMSHRC 509 (1985) this Commission held that a safeguard notice must identify with specificity the nature of the hazard at which it is directed and the conduct required of the operator to remedy such hazard. The Commission further held that in interpreting a safeguard notice a narrow construction of the terms of the safeguard and its intended reach is required. 7 FMSHRC at 512. In this regard, by its own specific terms the safeguard herein was applicable only when 35 miners were employed underground. In this case it is not disputed that no more than seven union miners and perhaps up to three supervisors were to be employed underground. For this additional reason there clearly would not have been any violation of the safeguard to have continued operating the subject mine in a non-producing status with seven union miners and three supervisory personnel as contemplated.

In addition the apparent failure of the Complainants to have consulted with the MSHA inspector who issued the safeguard as to whether the contemplated work conditions would have violated the safeguard demonstrates a lack of good faith on their part. Significantly the Complainants also failed to call that inspector as a witness in these proceedings. It is reasonable to infer from the absence of that key witness that his testimony would not have been supportive of the Complainants position herein and that they knew it.

is no evidence that the Complainants even considered these alternatives. It is apparent from this that they were more interested in preserving another job rather than exercising a sincere concern for safety.

I also note from the undisputed evidence that other mines in the region similar to the Virginia Pocahontas No. 6 mine and with a similar single track system do not generally use, and are not required to employ, a "dispatcher". The evidence shows for example that each of the Island Creek Coal Company mines in the area has established its own policy in this regard. For example at its Beatrice Mine no "dispatcher" is used unless a supervisor decides it is necessary in a particular circumstance. At the Virginia Pocahontas No. 1 Mine a "dispatcher" is used only when more than 12 union miners are employed underground. At the Virginia Pocahontas No. 2 Mine a "dispatcher" is used only when at least 25 union employees are working underground. At the Virginia Pocahontas No. 3 Mine a "dispatcher" is employed only if more than two pieces of track equipment are being used on one side of the mine and at the Virginia Pocahontas No. 5 Mine a "dispatcher" is employed only if two or more pieces of equipment are being used. The evidence shows that other Virginia mine operators including Westmoreland Coal Company have also operated without "dispatchers".

In addition former superintendant Reynolds said in his deposition placed in evidence that he checked with federal mine inspector Jack Burnette and a state mine inspector concerning the procedures he intended to use during the idle period at issue and that both agreed that it would not have been unsafe to operate the mine in the proposed manner.[3/]

Under the circumstances I find that the Complainants have failed in their burden of proving that they entertained a good faith and reasonable belief that their refusal to work

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3/ The Complainant's objection to this testimony at the posthearing deposition on the grounds that it was hearsay is denied.

Gary Melick
Administrative Law Judge

tribution:

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rnton L. Newlon, Esq., Campbell & Newlon, P.C., P.O. Box
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April 23, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. VA 85-26
	:	A.C. No. 44-04614-03505
v.	:	
	:	No. 1 Plant
BANNER COAL COMPANY, INC., Respondent	:	

DECISION

Appearances: Craig W. Hukill, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner; Joe Douglas Kilgore, Banner Coal Company, Inc., Coeburn, Virginia for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," for an alleged violation of the regulatory standard at 30 C.F.R. § 77.807-3. The genera issues before me are whether Banner Coal Company, Inc., (Banner) has violated the cited regulatory standard and, if so, whether that violation was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard i.e., whether the violation was "significant and substantial". If a violatio is found it will also be necessary to determine the appropriate civil penalty to be assessed in accordance with sectio 110(i) of the Act.

The citation at bar, No. 2277631, alleges a "significa and substantial" violation of the regulatory standard at 30 C.F.R. § 77.807-3 and charges as follows:

> "The energized high voltage power lines (12,440 volts) passing over the stock pile area ranges in hight [sic] from 26 feet to 34 feet. The front-end loader measures 18 feet high when the bucket is extended to its full hight [sic]. The coal trucks, dumping under the high voltage lines, are 27 feet

when any part of any equipment operated on the surface of any coal mine is required to pass under or by any energized high-voltage powerline and the clearance between such equipment and powerline is less than 10 feet such powerlines must be deenergized or other precautions taken.

On February 28, 1985, Bruce Dial, an inspector for the Federal Mine Safety and Health Administration (MSHA) was performing an inspection at Banner's No. 1 Plant. It is undisputed that energized power lines carrying 12,440 volts passed over a portion of the coal stockpile at the plant. In addition a Hough 100 model front-end loader was then operating beneath the power lines with its bucket extended to its full height of 18 feet from the ground. Both tandem and tractor-trailer coal trucks were also dumping on the stockpile in close proximity to the power line and the larger trailers, when extended to the full dumping position, measured 27 feet from the ground.

Inspector Dial measured the height of the high voltage power line using a Warren-Knight Abney Level. It was 26 feet at the lowest point he was able to measure i.e. a location 10 feet horizontally from the lower support pole. Dial observed that as coal was being added to the stockpile the distance between the top of the stockpile where the equipment was operating and the high voltage power line was decreasing thereby increasing the potential hazard.

Banner disputes only the accuracy of Dial's measurement of the height of the power lines using the Abney Level. Banner President, Joe Douglas Kilgore, telephoned a civil enginer and a land surveyer who purportedly informed him that a 20% error is possible using the Abney Level and that the instrument would not be accurate. Kilgore did not however take his own measurements or seek to have any more accurate measurements made even though the cited area remained roped off for more than 3 months. Accordingly, there is no affirmative evidence contradicting the measurements taken by Inspector Dial. In any event even had the measurements been in error by as much as 20% there would nevertheless have been a violation of the cited standard.

According to Dial, electrocution of a truck driver was likely under the circumstances since the extended bed of the tractor-trailer reached 27 feet and the power line was then only 26 feet above stockpile. Under the circumstances it would be reasonable to expect that the truck bed could strike

also observed that there had been fatalities within the MSHA district over the previous 6 years from mining equip contacting high voltage power lines. Within this framewo of evidence it is clear that the violation herein was ser and "significant and substantial." See Secretary v. Math Coal Co., 6 FMSHRC 1 (1984).

Inspector Graybeal had also previously inspected the Banner No. 1 plant in September 1984. Graybeal did not c Banner for any violation of the standard at issue because saw no equipment operating in close proximity to the powe line. It is not disputed however that Graybeal discussed the potential problem with Banner president Kilgore warni him that he was required to maintain a 10 foot clearance the power line. Kilgore was further warned not to stockp coal beneath the power line to the point where a 10 feet clearance could not be maintained. Under the circumstanc find that Kilgore was negligent in permitting the build-u the coal stockpile beneath the power lines to the point w the minimum clearance was not maintained.

In assessing a civil penalty in this case I have als considered that the mine operator is small in size, has a limited history of violations and abated the cited condit in a good faith and timely manner. Indeed the evidence s that Banner expended $1,705 to have the Old Dominion Powe Company raise the level of the power lines. Considering these factors I find that a civil penalty of $250 is appropriate.

ORDER

Banner Coal Company, Inc. is ordered to pay a civil penalty of $250 within 30 days of the date of this decisi

Gary Melick
Administrative Law Judg

Distribution:

Craig W. Hukill, Esq., Office of the Solicitor, U.S. Depa ment of Labor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

Joe Douglas Kilgore, President of Operations, Banner Coal

v.	:	Citation No. 2009928; 6/20/84
	:	
RETARY OF LABOR,	:	FMC Trona Mine
INE SAFETY AND HEALTH	:	
DMINISTRATION (MSHA),	:	
Respondent	:	

DECISION

earances: John A. Snow, Esq., James A. Holtkamp, Esq., and Matthew F. McNulty, III., Esq., Salt Lake City, Utah, for Contestant; James H. Barkley, Esq., and Margaret Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Respondent.

ore: Judge Lasher

This proceeding arose upon the filing of a notice of contest July 10, 1984, pursuant to Section 105(d) of the Federal Mine ety and Health Act of 1977 (30 U.S.C. § 815(d)(1977)), herein Act.

By its initiation of the proceeding the Contestant (herein) sought to obtain review of Part "a" [1]/ Citation No. 2009928, ued June 20, 1984, charging it with a violation of 30 C.F.R. 7.21-78 [2]/ to wit:

"The Marietta Bore Miner No. 7426 approval No. 2G-2431A-2, not maintained in permissible condition because:

(a) On 3-29-84 the short circuit protective relays at the remote starter were found to be set for 1200 amperes fault current.

Part "b" of the citation was vacated by my written order ein dated July 23, 1985, after the Secretary moved for ation at hearing (See separate transcript dated March 8, 5).

This regulation provides: "Only permissible equipment ntained in permissible condition shall be used beyond the last n crosscut or in places where dangerous quantities of mmable gasses are present or may enter the air current."

Although the manufacturers MSHA approved design specifi
cation Ref. 2G-2431A-2 [3]/ stipulates maximum relay sett
of 1200 amperes the specification also stipulates maxim
trailing cable length as follows: "Cable from power sou
to sled input is less than 100 feet. Total length from
power source to machine not to exceed 700 feet. Protec
at power source is provided by a circuit breaker with a
instantaneous trip setting of 1500 amperes.

It was found that the 4160 volt Bore Miner branch circu
was far in excess of these specifications."

FMC operates a large underground trona mine (Tr. 46, 62
It liberates approximately 1,500,000 cubic feet of methane e
24 hour period (Tr. 46). It is an extremely gassy mine (Tr.
and, as conceded by Contestant, the mine's face equipment is
required to comply with the permissibility regulations (Tr.
FMC Brief, p. 1).

The pertinent permissibility regulation mentioned in th
Citation is 30 C.F.R. 18.35(a)(5)(ii), [4]/ under the rubric:
"Portable (trailing) cables and cords", which provides:

3/ As will be explained further subsequently, this referenc
number refers to the second approval (Ex. C-2) of the miner
appropriate government regulatory agency. The first approva
the miner/starter sled (Ex. C-1) was by the Bureau of Mines
was shown on the original specifications (C-1) which presuma
accompanied the miner and sled when such were received by FM
July 5, 1974. (Tr. 259). The second approval dated July 30,
1974, was sent to the manufacturer of the miner/sled and not
FMC. A third approval (Ex. C-3) which was made a part of th
record applied to another miner and has no impact on the re-
solution of this matter (Tr. 89, 90, 108, 114).

4/ A general statement of the purposes of the regulations w
which Section 35(a)(5)(ii) is grouped is set forth in 30 C.F
18.1, to wit:

> "The regulations in this part set forth the requirem
> to obtain MSHA: (a) Approval of electrically operate
> machines and accessories intended for use in gassy m
> or tunnels, (b) certification of components intended
> use on or with approved machines, (c) permission to
> modify the design of an approved machine or certifie
> component, (d) acceptance of flame-resistant cables
> hoses, and conveyor belts, (e) sanction for use of e

more than 500 feet, such length of cable shall be permitted only under the following prescribed conditions:

X X X X X X X

(ii) Short-circuit protection shall be provided by a protective device with an instantaneous trip setting as near as practicable to the maximum starting-current-inrush value, but the setting shall not exceed the trip value specified in MSHA approval for the equipment for which the portable (trailing) cable furnishes electric power."

CONTENTIONS OF THE PARTIES

The evidence and arguments in this matter are difficult to rshal. A preliminary birds-eye view of the dispute is helpful

The Secretary's contentions, evidenced at hearing and in its st-hearing brief, consider Part "a" of the Citation to have leged two infractions. First, that the trip setting on the ort-circuit protection device required by the cited regulation C.F.R. 18.35(a)(5)(ii), was set too high at 1200 amperes. econdly, the Secretary alleges that FMC was in violation by erating the miner contrary to the manufacturer's specifications to the lengths of trailing cable between the miner and (1) the ed, and (2) the "power source", as set forth in the second vernment approval, Ex. C-2, at page 8, which FMC denies ceiving or of having any knowledge.

FMC, in addition to denying any knowledge of the requirents of the second approval ("revising" the manufacturer's ecifications for the miner and sled), contends that it ithfully conformed to the requirements of the first approval x. C-1, Tr. 91) which authorized a trip setting of 1200 ampere d that it had no knowledge of the second approval which set rth maximum trailing cable lengths between the miner and sled d power source and wherein the only reference to the term ower source" is used. FMC contends that the term "power urce" in any event is vague and that the wording of 30 C.F.R. .35, "when reviewed in context with the specific 1200 amp tting requirement, is difficult to interpret and follow" and ils to afford FMC of fair notice as what is required and pected. As an alternative argument, should it be charged with tice of the second approval containing the cable length quirements, FMC

miner runs.

PRELIMINARY FINDINGS

The preponderant reliable and probative evidence of record establishes the following.

On March 29, 1984, a federal mine inspector inspected the mine, including Marietta Bore Miner No. 7426 (herein the miner) (Tr. 47, 83). The purpose of the miner is to mine the product; the miner thus operates at the face past the last open crosscut (Tr. 47). It is electrically powered (Tr. 47) and as an electr cally powered piece of face equipment it is required to comply with all permissibility regulations.

The miner was ordered by FMC by purchase order dated May 7 1973, and the miner was received by FMC on July 5, 1974 (Tr. 42 259). National Mine Service Company was the manufacturer of th miner and its accompanying power sled (Tr. 258). The 1200 ampe relay setting on the power sled for the miner was set by FMC in accordance with the schematic diagram prepared by National Mine Service Company (Tr. 258; Ex. C-1). The schematic drawing or print contains the following admonition: "This drawing is not be changed without approval of the Bureau of Mines." (Tr. 259). This first certification approval for the miner was subsequentl revised in a July 30, 1974 transmittal from Joseph J. Seman, of the Mining Enforcement and Safety Administration, to National Mine Service Company (Ex. C-2), herein referred to as the "seco approval." FMC was never apprised of the revision contained in the second approval and continued to operate the miner in accor ance with the schematic print requirements that were delivered with the machinery in question (Tr. 259-261). The Secretary failed to establish FMC's knowledge or awareness of the second approval, actually or constructively. (Tr. 232, 233, 288-290). FMC had no knowledge of the second approval prior to or at the time of inspection (Tr. 264, 288-290, 320, 330, 354-355).

On the day of the inspection the miner derived its power a generally shown in Exhibit R-1. Thus, the initial source of al mine power was a surface generator connected to a surface transformer delivering 13,800 volts (Tr. 48). From this surfac generator a power cable transmitted the power to a second trans former located underground (Tr. 48). At the second transformer the power was reduced to 4,160 volts (Tr. 48, 49,) and this electric current (4160 volts) by which the miner was powered (T 64) traveled from the second transformer 10,300 feet through a

A relay (protective device) setting is the predetermined mount of fault current required to deenergize a machine (Tr. 28-130, 282). Fault current is the amount of current (amps) hich will flow through a wire in the event of a fault (short ircuit)(Tr. 129, 146, 147, 340).

The power source of the 4,160 volts to the miner was the ,160 volt transformer (Tr. 49, 59, 60, 64-67, 80, 92-95, 31-133, 140a, 160-161, 193, 199, 311-313, 344, 363; Ex. R-2).

In evaluating FMC's contention that the starter sled, rathe han the transformer, was the "power source", it is first noted hat the purpose for the remote control sled is to comply with egulations which prohibit high voltage switching devices on iners (Tr. 50). Therefore, a high voltage on/off switch must b laced in a remote location away from the face and in fresh air Tr. 51). This on and off switch does not produce power as a ource, but simply "interrupts" it (Tr. 59). Under FMC's ar- angement, had there been a short-circuit in the miner, the powe ould have been interrupted 700 feet away at the started sled Tr. 50). It is also noted (1) that IEEE 5/ Greenbook (Ex. R-2) entions only generators or transformers as power sources and (2 hat the 4160 voltage upon which the miner was powered originate t the second (underground) transformer 10,300 feet distant (Tr. 35-138).

The maximum starting "inrush" current of the miner was 613 mps (Tr. 146, 208). "Maximum starting current inrush Value" is he amount of current expressed in amperes required to start the iner (Tr. 129, 318-319, 338-339). Once the miner is started ven less current is required to keep it running (Tr. 129).

As previously noted, on the day of the inspection (March 2 984), the trip setting on the short circuit device for the mine located on the sled) was set at 1200 amperes (Tr. 48, 56, 267) uch 1200-ampere setting was specified by the first government pproved manufacturer's specification for the miner (Ex. C-1) a as not specified to be either a "maximum," "ceiling"" or minimum" setting, or otherwise characterized (Ex. C-1, Tr. 207 10).

5/ Institute of Electrical and Electronic Engineers.

Only after a second inspection was undertaken on May 1, 1
presumbly further contemplation, was FMC authorized to re
setting (Tr. 268).

Subsequent to March 29, 1984, a fault current (short
circuit) analysis was conducted by MSHA electrical engine
Terrance D. Dinkel which indicated that the minimum phase
current, in the event a fault occurred in a cable at the
to be 1005 amperes. Had such a fault occurred with the t
setting on the protective device on the sled set at 1200
the circuit would not have been interrupted (Tr. 149, 150
Thus, the miner was not adequately protected against shor
circuit faults (Tr. 155-156). To make the short-circuit
tection effective, the maximum inrush current being 613 a
the low fault current being 1005 amps, the trip setting s
have been set as close to the 613 ampere setting as possi
151, 152, 164) in approximately the 650-700 ampere range.
Qualified electrical engineers are able to make such adju
to the trip setting (Tr. 154-155, 179, 201, 219).

The only trailing cable outby the miner (upstream fr
miner toward the surface transformer) was the 700-foot le
cable between the miner and the starter sled (Ex. R-1; Tr
62a, 63, 110, 270). The 9600-foot length of cable betwee
sled and the second (4160 volt) transformer-found to be t
"power source" herein-was "feeder" cable or power cable,
not trailing (portable) cable for the miner within the me
30 C.F.R. 35.18(a)(5)(ii) (Tr. 60, 63, 68, 77, 110, 116,
278-281).

The longer the cable, the greater amount of current
as it travels through the cable (Tr. 148, 156, 160-164, 1
cause of "resistance" in the conduction of the current (T
Loss of fault current as it travels through excessive cab
can result in a circuit breaker not tripping (Tr. 148-150
151-161, 175).

The safety standard (Section 35.18(a)(5)) relied on
Secretary contains no reference to the term "power source
is this term found in the original schematic print (Ex. C
the miner's electrical set-up. It appears, from the stan
of the documentary evidence herein, only in MSHA's subseq
second approval (Ex. C-2, p.8) since the provisions of Ex
p. 5 do not apply to the miner in question (Tr. 108, 114)

ads as follows:

TRAILING CABLE
3 Conductor, No. 2, SHD-GC, 5 kv, 2.09" O.D., flame-resistant between miner and remote skid-mounted (open-type) sled containing starter and Femco ground monitor chopper receiver. Power input and output of sled unit is made through quick disconnect plugs. Cable from power source to sled input is less than 100 feet. Total length from power source to machine not to exceed 700 feet. Protection at power source is provided by a circuit breaker with an instantaneous trip setting of 1500 amperes. (Emphasis added)

DISCUSSION, ULTIMATE FINDINGS, AND CONCLUSIONS

Taking up the first alleged infraction mentioned in the tation, that relating to the 1200 ampere trip setting, FMC's imary contention is set forth at page 6 of its Brief, to wit:

> "MSHA suggests that the specifications regarding short-circuit protection provided by the manufacturer should have been modified by FMC in accordance with the regulations found at 30 C.F.R. § 18.35 . . . . With this suggestion MSHA asserts that FMC was under a duty to ignore the specific 1200 amp setting and to operate the equipment at an ". . . inferred setting, which should be lower than the ceiling level." Apparently MSHA believes that the 1200 amp setting is the ceiling level. MSHA advances this position in spite of the fact that the manufacturer's specification level of 1200 amps is nowhere referred to as a ceiling level.
>
> In relying upon § 18.35 to support its contention of violation, MSHA requires a tortured and unnatural reading of the regulation in question. By MSHA's own admission, such a reading would require the operator to ignore a specifically authorized level and adjust the equipment to an "inferred setting".

I disagree that the regulation, i.e., subparagraph ii, equires the mine operator to ignore a specifically authorized evel per se. FMC's argument completely ignores the "excessive able length" consideration which triggers the applicability of ubparagraph" ii). This contention and FMC's claim that it did ot have "a fair indication" of what was required by the regu-ation-require further examination of the standard.

in effect says, that in no event shall the setting requ
the first phrase exceed the trip value specified in an
approval.

Applying the requirements of the regulation to FMC
electrical arrangement shown in the record, it is concl
FMC was required by the regulation to set the instantan
setting "as near as practicable to" 700 amps, which was
approximate starting current inrush value. Since this
number was well below the MSHA approved trip value--the
phrase of the regulation clearly and simply had no appl
the miner in the circumstances involved here. To illus
the starting current inrush value for some reason been
say 1250 amperes, the secondary protective limitation o
second clause of the regulation would have become appli
cause the trip value shown in the approved specificatio
amperes.

The critical focus must be on what set of circumst
the applicability of the standard. Quite simply, a min
must comply with the provisions of subparagraph ii of s
35.18(a)(5) where, as here, the miner's trailing cable
500 feet. Thus, contrary to FMC's argument, its awaren
second approval (Ex. C-2) was not a prerequisite to its
gation to comply with the standard (Tr. 322) and its al
difficulty with the term "power source" has no bearing
question.

Reading the regulation in the manner the Secretary
requires no strained or tortured interpretation as FMC
It clearly states "Where the method of mining requires
of a portable trailing cable to be more than 500 feet,
length of cable shall be permitted only" under the cond
prescribed in subparagraph "ii". At the time of the in
and at all other times pertinent herein, FMC knew the m
trailing cable length was 700 feet and in excess of the
length permitted without compliance with Subparagraph "
standard, whether viewed in the abstract-or in the cont
FMC's mining and electrical arrangement for the miner--
ambiguous, vague, or uncertain. It is concluded that m
common intelligence would not have to guess at its mean
Accordingly, FMC's contest as to this facet of part "a"
Citation is found to lack merit and FMC is found in vio
30 C.F.R. 57.21-78.

in compliance. As previously noted, the second approval limits the length of the trailing cable from the power source to the sled input to be "less than 100 feet," and limits the "total length" from the power source to the miner to not exceed 700 fe This regulation obviously contemplates that the cable from the power source (hereinabove found to be the 4160 volt transformer some 10,300 feet distant from the miner) be of the "trailing" c "portable" variety. This, of course, simply does not fit the electrical cable scheme which FMC had in place at the time of t alleged violation since the only trailing cable involved was th 700-foot length from the miner to the sled. Nevertheless, it i clear that FMC's electrical power scheme contravened the requir ments of the second approval as to both the 100-foot and 700-fc provisions. But this is not the decisive question posed. FMC aptly points out that as of July 30, 1974, MSHA (actually MSHA' successor, MESA - the Mining Enforcement Safety and Health Administration, a division of the Department of the Interior), in extending approval for the miner, had modified the certificatio requirement to restrict the cable length from the power source the miner to 700 feet, but not apprised FMC of such modificatio (Tr. 288-290, 330). There is no specification of pertinent cab lengths in the first approval (Ex. C-1; Tr. 262). FMC's contention and evidence that it first learned of the second approv during the second inspection tour on May 1, 1984, was not challenged or rebutted by the Secretary. On the basis of this record, it would appear that the only way a mine operator would learn of such a modification as that contained in the second approval would be, as FMC contends, as a result of the issuance of a citation. In a case involving analogous circumstances, Secretary v. U.S. Steel Mining Company, 6 FMSHRC 1369, 1371 (1984), Judge Gary Melick made the following determination:

> "MSHA Inspector James Potiseck conceded that he could not verify that the mine operator had received notice of the necessary modification either from MSHA or from the Service Machine Company prior to the issuance of hi citation. Indeed, Potiseck admitted that the letter in evidence (Government Exhibit No. 9) supposedly informin U.S. Steel of the required changes was sent to the wron address. The district electrical engineer for U.S. Steel, Gary Stevenson, testified that after receiving t citation, he had been unable to locate anyone who had received the noted letter.
>
> Within this framework of evidence, it is clear that U.S Steel did not receive notice of the change in the permissibility requirements for the cited longwall mining unit. Without such prior notice, there can be no vio-

"It is a basic principle of due process that an enac
is void for vagueness if its prohibitions are not cl
defined. Vague laws offend several important values
First, because we assume that man is free to steer b
tween lawful and unlawful conduct, we insist that la
give the person of ordinary intelligence a reasonabl
opportunity to know what is prohibited, so that he m
act accordingly. Vague laws may trap the innocent b
providing fair warning. Second, if arbitrary and di
criminatory enforcement is to be prevented, laws mus
provide explicit standards for those who apply them.
vague law impermissibily delegates basic policy matt
to policemen, judges, and juries for resolution on a
ad hoc and subjective basis, with the attendant dang
of arbitrary and discriminatory application. Third,
related, where a vague statute "abut(s) upon sensiti
areas of basic First Amendment freedoms," it "operat
to inhibit the exercise of [those] freedoms." Uncer
meanings inevitably lead citizens to "'steer far wid
of the unlawful zone' . . . than if the boundaries o
forbidden areas were clearly marked."

On this record, it must be found that FMC had no warnin
what constituted the conduct the Secretary contends was pro-
hibited; FMC's contest of that aspect of the Citation chargi
improper, excessive cable length is found meritorious.

ORDER

Based on the foregoing findings and conclusions, FMC's
contest is found to be meritorious in part. That part of Pa
"a" Citation No. 2009928 alleging an infraction of the manu-
facturer's approved design specification No. 2G2431A-2 becau
excessive trailing cable lengths is vacated. That part of P
"a" of the Citation alleging non-compliance with 30 C.F.R. 1
(a)(5)(ii) and a resultant violation of 30 C.F.R. 57.21-78,
consisting of the first 3 paragraphs of the Citation and per
ing to the trip setting of the miner's short-circuit protect
device, is affirmed.

Michael A. Lasher, Jr.
Administrative Law Judge

ulty, III, Esq., VanCott, Bagley, Cornwall and McCarthy, 50 S.
n Street, Suite 1600, Salt Lake City, UT 84110 (Certified
1)

c

April 24, 1986

A. D. BRACKEN, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. CENT 85-132-D
v.	:	
	:	MADI CD 85-10
ALPINE CONSTRUCTION COMPANY, Respondent	:	

ORDER OF DISMISSAL

Before: Judge Merlin

The Complainant has sent a letter to the Commission, dated March 18, 1986, stating that unless an impartial special investigator can be assigned to the case, who does not know him or the other parties, he does not want to pursue this matter an further.

This Commission has no authority to assign a special inves gator to this case or to undertake its own initial investigatio of discrimination complaints. This responsibility is the Secretary of Labor's.

In accordance with the Complainant's letter therefore, thi case is DISMISSED.

Paul Merlin
Chief Administrative Law Judge

Distribution:

A. D. Bracken, Box 89, Stigler, OK 74462 (Certified Mail)

Mr. Leon Burns, Alpine Construction Co., P. O. Box 339, Stigler OK 74462 (Certified Mail)

/gl

AVID RATLIFF, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. KENT 85-108-D
ETHENERGY MINES, INC., Respondent	:	PIKE CD 85-05

DECISION

efore: Judge Fauver

This proceeding has been docketed as a claim for relief nder the discrimination provisions (section 105(c)) of the ederal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, t seq.

On March 25, 1986, Respondent moved to dismiss the omplaint on the grounds (1) that Complainant has not stated claim for relief which can be granted under the Act, and 2) that Complainant has failed to comply with the prehearing equirements of the notice of hearing.

The complaint alleges that Respondent failed to grant omplainant a second exercise of super-seniority rights, o return from layoff, under a collective bargaining greement between Respondent and the United Mine Workers of merica.

Complainant has not responded to the motion to dismiss or has Complainant filed a prehearing submission, which was ue on March 26, 1986.

On April 3, 1986, a Show Cause Order was issued to omplainant, allowing him until April 21, 1986, to show ause, in writing, why this case should not be dismissed:

(1) for failure to state a claim for which relief can be granted under the Act; and

(2) for failure to comply with the prehearing requirements of the Notice of Hearing (Hearing Term dated January 15, 1986).

for which relief can be granted under section 105(c) of the Act.

ORDER

WHEREFORE IT IS ORDERED that the Motion to Dismiss is GRANTED, and this proceeding is DISMISSED.

William Fauver
William Fauver
Administrative Law Judge

Distribution:

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FALLS CHURCH, VIRGINIA 22041

April 28, 1986

RETARY OF LABOR
INE SAFETY AND HEALTH
DMINISTRATION (MSHA)

v.

TMORELAND COAL COMPANY

Docket No. WEVA 82-152-R
WEVA 82-369

PETITION FOR RECONSIDERATION

The recent decision of this Commission to reduce the l penalty in the captioned case is based on an erroneous rpretation of the intent of the undersigned in use of the s "gross negligence" and "negligence". Accordingly the ission's legal conclusion that the undersigned thereby eved that the operator's negligence was somehow lessened otally erroneous and reconsideration under the circum- ces would be appropriate.

Although this Commission reversed the "unwarrantable re" findings in the original decision of the undersigned actual findings underlying the operator's negligence not modified in any way. The use of the words "gross gence" in that decision, 5 FMSHRC 132 (January 1983) , and the use of the word "negligence" in the decision wing remand, 7 FMSHRC 1647 (October 1985) (ALJ), con- ng the same factual circumstances did not in any way ct on my part a belief that there was any lesser gence. The facts remain the same and had I known the ssion would have drawn any inference from the noted nology I would have again used the phrase "gross gence" to characterize the high degree of negligence in this case, for indeed it is my firm belief that the of this case demonstrate the highest degree of ence. This Commission of course has the authority to the civil penalty in this case but such a reduction be based upon any finding of lesser negligence by the igned because no such finding has ever been made.

Barry Wisor, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

Scott L. Messmore, Esq., Westmoreland Coal Company, P.O. Drawer A & B, Big Stone Gap, VA 24219 (Certified Mail)

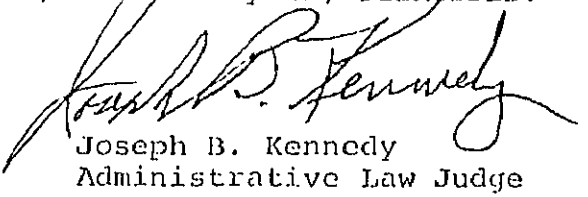
rbg

CRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 86-69-D
ON BEHALF OF	:	
KEVIN L. SMITH,	:	MORG CD 85-20
Complainant	:	
v.	:	Loveridge No. 22 Mine
	:	
NSOLIDATION COAL COMPANY,	:	
Respondent	:	
	:	

ORDER OF DISMISSAL

fore: Judge Kennedy

Complainant having failed to file his complaint as lowed by the order of March 11, 1986, it is ORDERED at the captioned matter be, and hereby is, DISMISSED.



Joseph B. Kennedy
Administrative Law Judge

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o

v.	:	Dutch Creek No. 2 Mine
MID-CONTINENT RESOURCES, INC., Respondent	:	

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Edward Mulhall, Jr., Esq., Delaney & Balcomb, Glenwood Springs, Colorado, for Respondent.

Before: Judge Carlson

This case, heard under the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the Ac arose out of an inspection at an underground coal mine operate by respondent Mid-Continent Resources, Inc. (Mid-Continent) ne Redstone, Colorado. On August 23, 1984, Larry Ganser, a coal mine inspector employed by the Secretary of Labor, issued two citations to Mid-Continent in which he alleged violations of m safety standards promulgated by the Secretary under the Act. the present proceeding the Secretary seeks to collect substant civil penalties as the result of the alleged violations. At t evidentiary hearing held in Denver, Colorado, both parties pre sented evidence. The parties waived the filing of briefs or o post-hearing submissions.

REVIEW AND DISCUSSION OF THE EVIDENCE

Citation No. 2213222

On the morning of August 23, 1984, Larry Ganser, a federa coal mine inspector, inspected the 204 headgate section of Mid Continent's Dutch Creek No. 2 Mine. While there, he observed a continuous mining machine inby the last open crosscut. The machine was withdrawn from the face and was not engaged in mir A 550-volt trailing cable furnished power to the machine. Whe the inspector looked at the cable he noted that its outer jack had been cut away where it entered the "stuffing box" and was nected to the machine. According to the inspector, the absenc of the outer jacket diminished the circumference of the cable the extent that air could freely enter and exit the box in whi energized wires in the cable were connected to the machine.

> The operator of each coal mine shall maintain in permissible condition all electric face equipment required by §§ 75.500, 75.501, 75.504 to be permissible which is taken into or used inby the last open crosscut of any such mine.

The machine was not in "permissible" condition, the inspe maintained, because the opening around the cable allowed the f exchange of atmosphere between the inside and outside of the b A "permissible box," he testified, must be able to contain any plosion of a gassy atmosphere within the confines of the box.

Through its answer, Mid-Continent confessed the existence the violation. It contested, however, the Secretary's characte ization of the violation as "significant and substantial," and puted the reasonableness of the proposed penalty of $900.00.

In penalty assessments, Section 110(i) of the Act requires the Commission to consider the operator's size, its negligence, its good faith in seeking rapid compliance, its history of pric violations, the effect of a monetary penalty on its ability to main in business, and the gravity of the violation itself.

The parties stipulated that Mid-Continent's mines in the Redstone, Colorado area produced a total of 743,844 tons of coa in the year in question, of which 463,504 tons came from Dutch Creek No. 2. They further stipulated that Dutch Creek No. 2 em ployed approximately 135 miners, with all mines employing about From these facts I must conclude that the size of the mining en prise was large.

The parties further stipulated that Mid-Continent abated t violation in good faith, and that payment of the proposed penal would not impair its ability to continue in business.

The evidence shows that Mid-Continent knew or should have known that the violative condition existed. The cut-away porti of the cable was clearly visible to anyone who approached the b and looked. Moreover, Mid-Continent's face boss at the area in question acknowledged that the cable was an inch larger than wa customary. Therefore, someone had to "trim it down" to get it into the box (Tr. 137). In other words, the defective conditio was not the result of an unnoticed accident or of a gradual det oration which could perhaps have been overlooked.

No useful purpose would be served in summarizing the many pa
of these records here. It is enough to say that during the
years prior to the instant citation, Mid-Continent received
numerous citations. On the other hand, one must recognize t
the Dutch Creek No. 2 operation is classified as a gassy min
it therefore undergoes nearly constant federal inspection.
fact, coupled with the mine's large size, tends to mitigate
impact of the mere numbers of violations.

We now consider the gravity of the violation. Mid-Cont
acknowledges that Dutch Creek No. 2 is properly classified a
"gassy mine" under the numerous regulations that deal with t
concept. Nor is it disputed that the opening around the tri
trailing cable where it entered the box on the mining machin
caused the box to lose its "explosion-proof" character and t
rob the machine of its "permissible" approval. Inspector Ga
testified that should an explosion occur because of the unpr
tected electrical connection, three miners would have been e
dangered at the time of inspection: the miner operator, his
helper, and a shuttle car operator. Five or six miners woul
have been in the vicinity had mining actually been in progre
he testified.

The inspector tested for methane presence at the face.
found a concentration of four-tenths of one percent. Under
standards, mining may take place at levels under one percent
inspector testified without contradiction that the mine atmo
becomes explosive when the methane concentration reaches fiv
percent.

The Secretary's position is that violations such as the present one, which increase the risk of an unconfined electrica spark in a gassy mine, are always serious. Whatever the immedi ate level of methane, the known possibility of methane releases together with the inevitable presence of some amounts of coal d (excessive or not), makes for a potentially lethal situation. is so, the Secretary contends, even with the presence of methan alarms or automatic shutdown devices.

The inspector's assessment of the danger took into account that his reading of air flow near the face was only about half what was required by the mine's ventilation plan when mining wa in progress. Although mining had ceased by the time he arrived he inferred that the insufficient flows existed when mining was progress. He reasoned that the diminished flows allowed greate concentrations of methane and coal dust near the face, since the gas and dust generated there would not be diluted by the require large volumes of moving air.

The ventilation issue was directly raised by the inspector the second citation tried in this case, number 2213223. As will be seen in the discussion of that citation, I found that no vio- lation of the mine's ventilation plan was proved. It follows th a lack of proper ventilation should not considered as an aggrava factor in determining the gravity of the present violation.

Moreover, I must conclude that the presence of a methane al and shutdown device did tend to reduce the possibility of an ex- plosion. The safety director's recitation of the history of low levels of methane release for the face in question is less im- pressive. It is scarcely prudent to assume that greater amounts of methane will not be released with the next mining advance. M over, that witness admitted that bumps and bounces sometimes occ in the mine, causing release of methane to a two-percent level. The witness did not claim, of course, that he was able to foreca the times when these phenomena may occur.

Overall, I must also conclude that the evidence establishes the gravity of the violation to be moderate-to-high. No conditi which deprives a piece of electric face equipment of its permiss bility in a gassy mine can be taken lightly. The standards insis upon multiple precautions in underground coal mines - particular gassy mines - because of the potentially disasterous consequences of fire or explosion. One simply cannot reason, for example, tha if methane control and coal dust suppression measures are well maintained, that one can be casual about safeguards against ignit

The Secretary's citation characterized the violation as "significant and substantial" under section 104(d) of the Act. In Cement Division, National Gypsum Company, 3 FMSHRC 822 (1981), the Commission defined such a violation as one where " ... there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Doubtless, had an explosion or fire occurred, the likely injuries to miners would have been severe. That an explosion would occur was not probable, certainly, but was reasonably possible. The violation furnished a ready ignition source. Had this been combined with an untimely failure of face ventilation or some other failure in coal dust or methane control, the basic ingredients for a disaster would have been at hand. In this regard, the facts discussed in connection with the other citation in this case are instructive. Those facts were insufficient to establish the violation charged because the unplanned disruption in ventilation which occurred was not proved to have happened during mining. (As mentioned earlier, mining generates coal dust and may liberate methane.) They were sufficient to illustrate, however, that accidental disruption of ventilation can take place in the mine in question. That the accident took place when no mining was in progress was mere fortuity. The Secretary correctly classified the present violation as "significant and substantial."

Citation No. 2213223

This citation was written by Inspector Ganser in the 204 head gate section on the same morning as the permissible face equipment citation. 1/ It is undisputed that the inspector took a measureme of air flow at the face which showed 11,190 cubic feet per minute. It is also undisputed that Mid-Continent's approved ventilation plan called for minimum quantity of 20,000 cubic feet per minute o air in development sections during the cutting, mining or loading coal (respondent's exhibit 1, section 6.2). The inspector believe that his reading showed that Mid-Continent was violating this provision. He therefore cited the operator for violation of the mandatory standard published at 30 C.F.R. § 75.316, which provides:

> A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970. The plan shall show the type and location of mechanical ventilation equipment installed

or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every six months.

The inspector admitted that at the time he made his inspect and took his reading, coal was being neither cut, mined, nor loa The real issue to be decided, then, is whether the evidence just a reasonable inference that the air flow was below 20,000 cubic per minute earlier on the morning of the inspection when mining admittedly in progress. For the reasons which follow I conclude the established facts do not adequately support such an inference

The inspector testified that he arrived at the area in quest at about 10:05 a.m. or 10:10 a.m. and wrote the ventilation citat at about 10:45 a.m. (Tr. 45, 73, 95). He acknowledged that the n step in the mining cycle would have been roof bolting. For roof bolting, the record shows, the ventilation plan requires but 3,00 cubic feet per minute of air (Tr. 96-99, respondent's exhibit 1, section 6.8).

The inspector assumed, without being certain, that the morni shift had reported to work at 8:00 a.m. He professed a certainty that the mining had ceased only a short time after he had arrived. He found coal dust in the air, he said, and the area was still wet from the spray emanating from the continuous mining machine during cutting. Beyond that, and most important, he maintained that the air flow volume present at inspection could not have decreased fro the 20,000 cfm level to 10,190 cfm in the short time since mining had ceased. He did not claim firsthand knowledge of the cause of the decrease in air, but reasoned that since it took from 10:45 a. to 12:15 p.m. to bring the volume back up to the 20,000 level, the problem was a major one. He admitted having been told by a manage ment official that the problem was caused by a check curtain havin been knocked down elsewhere in the air course. The inspector re- jected that explanation, however, because in his opinion a section of curtain could have been replaced in 15 minutes; it would not have taken an hour and a half.

Mid-Continent's principal witness disagreed with most of the inspector's premises. Mr. Jerome, the face boss, testified that th shift had started at 7:00 a.m., not 8:00 a.m. He agreed that the face had been advanced about 15 feet that morning, but he insisted he had done the required pre-shift readings and found the air-flow to have been 23,000 cfm. He estimated that mining had ceased at least 15 minutes before the inspector arrived. [More time - at lea

I find Mid-Continent's explanation of the reduced air at the ace plausible. A large diversion of air from the prescribed air ourse would likely cause a fairly rapid decline in air flow at t ace. Clearly, displacement of the airlock would tend to create arge diversion. The evidence does not disclose the time at whic he trailer knocked down the curtain. Under proper circumstances he may indeed infer a present condition existed at a time past. n this case, however, the inspector's conclusions are simply too peculative to constitute a convincing set of proofs. The burden f proof on the issue of violation rests upon the Secretary. He id not sustain that burden because he did not effectively negate he possibility that the air at the face remained at the prescri olume until after mining had ceased.

One more matter deserves comment. The inspector and the fa oss differed rather heatedly over whether the crew at the face et a timber and extended the line curtain to it after the face dvanced. Mr. Jerome insisted that this was done, and that it i ignificant because he took a satisfactory air reading at the pl here the curtain was "winged out" to better sweep the face with ir. It was undisputed that the timber could not have been set ining and loading had ceased because the timber would have inte ered with the use of the face equipment (Tr. 133-135). Inspect anser, however, was certain that the line curtain was not exten hen he took his own readings (Tr. 199). He was certain, he sai ecause the change in the configuration of the curtain would hav ielded different measurements than those he got when he calcula he area at the mouth of the line curtain - an integral step in etermining the air flow.

I find no reason to question the fundamental truthfulness o ither witness, despite the irreconcilable difference in their t ony. I must therefore attribute that difference to a failure i ccurate recall on the part of one witness or the other. I have ttempted to resolve the matter because if Jerome were declared nd the inspector correct, the result would not be changed. If, ndeed, a reading showing a 20,000 cfm flow was taken by Mid-Con fter the mining ceased, it would be compelling evidence that th as no violation. If, on the other hand, such a measurement was aken, or if it was taken and found to be less than 20,000 cfm, acts would not add substantial weight to the Secretary's case. hey do not bear directly on the essential question: the level ir flow during cutting, mining or loading.

The citation will be vacated.

CONCLUSIONS OF LAW

Based upon the entire record herein, and in accordance with e factual determinations contained in the narrative portion of is decision, the following conclusions of law are made:

(1) The Commission has jurisdiction to decide this matter.

(2) The respondent, Mid-Continent, admits violation of the ndatory safety standard published at 30 C.F.R. § 75.503, as leged in citation number 2213222.

(3) The violation was "significant and substantial" within e meaning of section 104(d) of the Act.

(4) The appropriate civil penalty for the violation is 00.00.

(5) Mid-Continent did not violate the mandatory safety andard published at 30 C.F.R. § 75.316, as alleged in citation mber 2213224.

ORDER

Accordingly, citation number 2213222 is ORDERED affirmed; a vil penalty of $600.00 is ORDERED assessed therefor, to be paid hin 30 days of the date of this decision; and citation number 3223 is ORDERED vacated.

John A. Carlson
Administrative Law Judge

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